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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID A. HAMMOND, et al., on his own behalf and on behalf of all individuals similarly situated,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND TRANS WORLD AIRLINES, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Seventh Circuit correct when it repudiated the tripartite standard established by this Court in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), that a union breaches its duty of fair representation when its actions are "arbitrary, discriminatory or in bad faith," and replaced it with a single, universal minimum rationality standard by which all union conduct must be measured?

2. In a merger of two airlines whose pilots are represented by the same union, is it a breach of the duty of fair representation for the union to:

a) refuse to implement the merger policy duly enacted in accordance with the union's democratic processes and made mandatory in such mergers?

b) intentionally discriminate against the smaller, politically weaker of two of its subunits when a merger requires their consolidation?

c) act in the manner described above because the larger unit threatens to secede from the union if it is not allowed to dictate the terms of the consolidation?

d) secretly conspire with the employer to have the employer use illegal economic pressure against the smaller, politically weaker subunit in order to force it to accept a consolidation of the seniority lists of the two subunits in the manner preferred by the larger subunit?

3. If a union acted for mixed motives, is it automatically absolved of any violation of the duty of fair representation if any one of its motives was proper?

PARTIES TO THE PROCEEDING

Petitioners David A. Hammond, *et al.*, were plaintiffs in the district court and appellants in the Court of Appeals for the Seventh Circuit. The plaintiffs in this case consist of two certified classes, defined to include:

> All persons who were members of the Air Line Pilots Association and employees or former employees of Ozark Airlines, and who are listed on the combined seniority list of Ozark and TWA pilots that is part of Exhibit H to the Second Amended Complaint.

and

> All persons who are not members of the Air Line Pilots Association, but who were employed by Ozark Airlines, and who are listed on the combined seniority list of Ozark and TWA pilots that is part of Exhibit H to the Second Amended Complaint.

A list of all of the pilots in the two classes is included on pages 90-101 of the separate Appendix.

Respondents Air Line Pilots Association, International and Trans World Airlines, Inc. were defendants in the district court and appellees in the Court of Appeals for the Seventh Circuit.

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OPINIONS AND JUDGMENT BELOW

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered December 28, 1992, reported at 981 F.2d 1524, and are set forth at pages A1-25 of the Appendix. The Order denying the petitions for rehearing and the suggestions of rehearing in banc, along with the Opinion of the judges dissenting from the denial of rehearing in banc (App. 26-34) is reported at 989 F.2d 944. The Opinion of the United States District Court for the Northern District of Illinois (App. 40-54) is reported at 141 LRRM 2063.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on December 28, 1992. A timely Petition for Rehearing with Suggestion for Rehearing In Banc was filed on January 11, 1993 and denied by an Order entered on April 6, 1993. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners, former pilots for Ozark Airlines, Inc. (Ozark), filed this class action against their union, the Air Line Pilots Association, International (ALPA), and Trans World Airlines, Inc. (TWA), the company that acquired Ozark in 1986. For many years, ALPA has had a comprehensive merger policy governing the integration of seniority lists in mergers where, as here, it represents the pilots of two (or more) merging airlines. A copy of the merger policy is included at pages 57 to 89 of the Appendix to this Petition. The policy was duly adopted by ALPA's democratically elected representatives and binds all ALPA members. It establishes a framework within which the pilot groups are directed to negotiate with one another, with the help of a professional mediator if necessary, concerning the way in which the two seniority lists will be consolidated as a result of the merger. The policy's linchpins are the binding arbitration it compels when the pilot groups cannot agree how to merge the lists (Merger Policy, §G1, App. 68), and the requirement that ALPA "use all

means at its disposal to compel the company to recognize the merged seniority list. . ." (*Id.*, §N4, App. 75). Because of the wide range of differences that inevitably exist between the two merging pilot groups in terms of their size, the age and length of service of their pilots, and the routes and equipment they fly, it typically is very difficult for them to reach a voluntary agreement on the matter. The prospect of mandatory arbitration, binding on both pilot groups and the union, is therefore indispensable to the effectiveness of the policy, because without it there is neither "pressure on anybody really to seek agreement" (Watt Tr. at 191) nor a mechanism for resolving differences if they don't.*

In this case, after studying the results of past arbitrations, the TWA pilots concluded that an arbitrator almost certainly would not give them what they wanted—an integration by date of hire at the premerger airlines (Pl. Stmt. of Facts, ¶30). The desire for such an integration was not based on a principled conviction that it was the "fair" or the "right" way to integrate the lists, but on the TWA pilots' judgment that it provided them with the greatest possible benefit in a merger with the Ozark pilots (Saaks Tr., Vol. II, at 75-76). However, their research disclosed that in a half century of airline mergers, no arbitrator appointed pursuant to ALPA Merger Policy had *ever* integrated lists in this fashion (Pl. Stmt. of Facts, ¶30).

Instead of trying through proper democratic channels to get ALPA to change its merger policy, or setting out to convince an arbitrator that date of hire integration was

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* Unless otherwise indicated, all record citations are to the materials submitted by the parties in connection with the summary judgment motions filed by ALPA and TWA.

appropriate in this case, the TWA pilots threatened ALPA President Hank Duffy that they would secede from the union unless ALPA ignored the merger policy and let them dictate the terms of the integration (App. 5). The Ozark pilots in turn demanded that ALPA adhere to the letter of the merger policy (Sec. Am. Cplt., Ex. C). Duffy capitulated to the TWA pilots' threat and declined to implement the policy on the date he was required to do so (Pl. Stmt. of Facts, ¶73). Later, he met secretly with Angelo Marchione, Chairman of the TWA MEC (ALPA's subordinate body at TWA), and promised him that ALPA would allow the TWA pilots to control the seniority integration (Marchione Tr. at 295, 298; Pl. Ex. 24 at 15, #3).

Next, the TWA pilots clandestinely met with TWA and jointly developed a scheme to force the Ozark pilots to accept a date of hire integration, even though TWA had no business reason for doing so other than a naked desire to benefit the TWA pilots at the expense of the Ozark pilots as a *quid pro quo* for contract concessions it received from the TWA pilots, and even though, as discussed below, TWA unilaterally imposed those same concessions on the Ozark pilots (Pl. Stmt. of Facts, ¶¶58-61, 86-87; O'Toole Tr. at 424-25; Hoar Tr. at 138-39). First, TWA lied to the Department of Transportation (which was considering whether to give its required approval of the merger) and the Ozark pilots, saying it had no definite plans to integrate the operations of the two airlines, and that there was therefore no pressing need for the pilot groups to resolve their dispute over the seniority integration (Pl. Stmt. of Facts, ¶¶47-52). The DOT expressly relied on these representations in declining to impose labor protective provisions as a condition of its approval of the merger (Pl. Ex. 276 at 16-18). Eleven days after the DOT approved the merger, TWA informed the Ozark pilots of a decision it had made and communicated to the

TWA pilots two months earlier—that it in fact intended to integrate the two airlines as quickly as possible (Pl. Stmt. of Facts, ¶¶51, 100, 106). TWA then joined ALPA officials in pressuring the Ozark pilots to facilitate this process by immediately agreeing to a date of hire integration (Hoar Tr. at 135-37; Pl. Ex. 273, ¶1). TWA turned up the pressure by unilaterally abrogating the Ozark/ALPA collective bargaining agreement and placing the Ozark pilots under the TWA/ALPA collective bargaining agreement, in violation of the *status quo* provisions of the Railway Labor Act, 45 U.S.C. §156 (Pl. Stmt. of Facts, ¶182). Finally, at the urging of the TWA pilots, TWA furloughed 86 Ozark pilots and threatened to furlough all the rest of them if they did not capitulate to the TWA pilots' demand for a date of hire integration (*Id.*, ¶¶192-97, 233-37).

At about this time, over three months after it was obligated to do so, ALPA purported to implement its merger policy, effective upon a declaration of Duffy, who waited three more weeks before issuing this declaration (Pl. Stmt. of Facts, ¶¶215-17). By then it was far too late. With 86 pilots already furloughed and TWA's threat to furlough the rest hanging over their heads, the knowledge that ALPA had abandoned them and that further resistance was pointless in view of the secret deals among ALPA, the TWA pilots and TWA, the remaining Ozark pilots caved in and voted to accept the merger documents put together by TWA and its pilots (*Id.*, ¶¶233-37). Everyone who testified on the subject agreed that ALPA's purported last minute initiation of its merger policy had no effect on the outcome of the merger (*Id.*, ¶245).

The result of the seniority integration process was a disaster for the Ozark pilots. As noted, 86 of their 556 were furloughed. No TWA pilot was furloughed. One hundred twelve of 298 Ozark captains were demoted to first

officer. No TWA pilot was demoted. All TWA pilots were immediately permitted to bid to fly all of Ozark's airplanes. The Ozark pilots in many cases have to wait decades before flying TWA planes. And the Ozark pilots were largely consigned to the bottom of the combined seniority list, where they are much more vulnerable to furloughs, and given, at least initially, much less contractual protection against furloughs than the TWA pilots had. The TWA pilots' own assessment was that they "got 99% of the marbles" in the merger (Pl. Ex. 140 at p. 2).

In Count I of their complaint brought pursuant to the Railway Labor Act, 45 U.S.C. §§151, *et seq.*, and 28 U.S.C. §§1331 and 1337, the Ozark pilots alleged that ALPA had breached its duty of fair representation and that its conduct was arbitrary, discriminatory and in bad faith. They said it was arbitrary for ALPA to refuse to apply its binding merger policy; that unions are barred from discriminating against the smaller, politically weaker of their subunits in a merger; and that ALPA acted in bad faith: (1) by capitulating to the TWA pilots' threat to leave the union if ALPA didn't allow them to control the seniority integration; (2) because Duffy acted in part to further his own bid for reelection as president of ALPA; and (3) because Duffy and other ALPA officials repeatedly lied to the Ozark pilots, stringing them along with false promises of support until it was too late for them to help themselves. Count I also charged TWA with participating in and facilitating ALPA's breach of its duty.

Count II charged TWA and ALPA with breaching the "wraparound agreement," a contract among ALPA, TWA and Carl Icahn (who had recently acquired TWA) which, petitioners contended, committed TWA to a seniority integration in accordance with ALPA's merger policy, and which ALPA could have, but did not, used to keep the

two airlines separate and to force TWA to deal fairly with the two pilot groups. Count III charged ALPA with violations of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§401, *et seq.* Counts IV and V challenged TWA's unilateral abrogation of the Ozark/ALPA collective bargaining agreement and its violation of the *status quo* provisions of the Railway Labor Act, 45 U.S.C. §156.

The district court certified two classes, one covering the 549 former Ozark pilots who were members of ALPA and the other covering the seven who were not. Following extensive discovery, both defendants moved for summary judgment. The motions were lengthy and complex, as each party attempted to support its position with voluminous documentation. Twenty months after the motions were filed, the district court granted them in their entirety in a one sentence order (App. 35). After confirming that the court did not intend to issue an opinion explaining its ruling, plaintiffs appealed and the Seventh Circuit remanded the case with directions that the district court do so (App. 36-37). The same day, the district court *sua sponte* issued a ten sentence order outlining "[f]or the guidance of the parties," an "explanation of the most significant of its reasons for granting the motions for summary judgment. . ." (App. 38-39). The order provided that it was "not an exhaustive statement of all of the reasons for granting those motions" and that "[a]dditional reasons for the court's ruling may be found in the arguments of defendants in their memoranda in support of their motions for summary judgment." *Id.* Following the remand from the court of appeals, the district court wrote a longer opinion. *Hammond v. Air Line Pilots Ass'n.*, 141 LRRM 2063 (N.D. Ill. 1991).

Plaintiffs again appealed and, while the case was pending in the court of appeals, TWA filed a Chapter 11 Bank-

ruptcy Petition. On February 13, 1992, the United States Bankruptcy Court for the District of Delaware lifted the automatic stay to allow the appeal to proceed and to permit the filing and disposition of this Petition for Writ of Certiorari (App. 55-56).

The Seventh Circuit affirmed in a decision which it *sua sponte* decided to issue in two cases that had been litigated and argued separately. *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (C.A. 7 1992). In the part of its decision addressing the *Rakestraw* case, the court reversed a district court judgment that ALPA had breached its duty of fair representation. (The *Rakestraw* plaintiffs have already filed a Petition for Writ of Certiorari, which is currently pending. No. 92-1798.)

The court of appeals began by noting that it would "simplify the facts. Details are irrelevant on the view we take of the union's obligations." (App. 3). The court then got some of the facts wrong, and slanted others against petitioners, even though all inferences should have been drawn in their favor on summary judgment. It disparaged the Ozark pilots' proposal to integrate the seniority list using a ratio method as a "demand for protection" (App. 4), while giving the TWA pilots implicit credit for being "willing to dovetail the seniority lists, giving each pilot seniority from the date hired by either airline" (*id.*), even though ratio integrations, unlike date of hire integrations, are common in the airline industry. Moreover, the Ozark pilots were ready, even eager, to submit their so-called "demand" to the binding decision of a neutral arbitrator, while the TWA pilots categorically refused to arbitrate their mere "willingness" for date of hire. The court suggested that the merger documents were fair because both pilot groups got protective "cells" (App. 5), but the cells actually demonstrate the opposite. The Ozark pilots' pro-

tective cells only let some of them keep their captain's seats for an extra couple of years before they had to give them up to TWA pilots. The TWA pilots got no such cells because they didn't need them; not one of them was displaced by an Ozark pilot. The TWA pilots' protective cells, on the other hand, severely limit, sometimes for decades, the right of the Ozark pilots to fly TWA's airplanes. The TWA pilots, by contrast, got immediate and total access to Ozark's planes.

Turning to the law, the court of appeals, in a remarkably candid repudiation of this Court's precedents, concluded that the "arbitrary, discriminatory, or in bad faith" standard established in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and recently reaffirmed in *ALPA v. O'Neill*, 499 U.S. ____, 111 S. Ct. 1127 (1991), was a set of mere "empty" "buzzwords" (App. 15). In the view of the court of appeals, "[t]hese terms are not self-defining. They are conclusions—epithets rather than standards of conduct or tools of analysis." (App. 11). The court then collapsed *Vaca*'s tripartite standard into a straightforward minimum rationality test imported from cases arising under the Equal Protection Clause of the Fourteenth Amendment. This extraordinarily deferential standard, the court concluded, is the only one by which a union's conduct should ever be measured, although it acknowledged that under this reformulated standard, short of "shoot[ing] strikebreakers," there is little a union is prohibited from doing (App. 16).

Applying its new standard to this case, the court observed that "[a] rational person *could* conclude that dovetailing seniority lists in a merger, treating service at either firm as of equal weight, without quotas or other preferences for either group of employees, serves the interests of labor as a whole." (App. 16, emphasis supplied).

Declining to evaluate or endorse ALPA's contention that it had provided the Ozark pilots with the "essential equivalent" of its merger policy, the court euphemistically characterized the union's failure to follow the policy as permissible "experimentation" (App. 17). The court summarily rejected petitioners' claim that ALPA had acted improperly by favoring the TWA pilots: "If the union's leaders took account of the fact that the workers at the larger firm preferred [a date of hire integration], so what? Majority rule is the norm." (App. 16). It found irrelevant the secret deals among ALPA, the TWA pilots and TWA; Duffy's efforts to advance his reelection prospects by manipulating the merger policy; and his capitulation to the TWA pilots' threat to leave ALPA if the union did not allow them to control the merger.

Both the plaintiffs in this case and the plaintiffs in *Rakestraw* petitioned for rehearing with a suggestion for rehearing in banc. On April 6, 1993, both of those petitions were denied over the objection of two judges who dissented from the denial of rehearing in banc. *Rakestraw v. United Airlines, Inc.*, 989 F.2d 944. The dissenting judges pointed out that "[t]he panel opinion deviates from the standard that the Supreme Court has established for [duty of fair representation] cases." (App. 27). "By not employing the tripartite standard," the dissenters observed, "the panel has deviated from the established law of the Supreme Court and the Seventh Circuit, and it has placed this circuit in conflict with other circuits." (*Id.*, 31-32). The court did so, the dissenters protested, notwithstanding that "this circuit has already been criticized by the Supreme Court [in *O'Neill*] for its crabbed interpretation of the duty of fair representation." (*Id.*, 32, n.2).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S REPUDIATION OF THE *VACA* TEST HAS CREATED TWO SEPARATE CONFLICTS IN THE CIRCUITS.

Over twenty-five years ago, this Court held that a union breaches its duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). In *ALPA v. O'Neill*, 499 U.S. ____, 111 S.Ct. 1127, 1134 (1991), after acknowledging that "there is admittedly some variation in the way in which our opinions have described the unions' duty of fair representation," the Court specifically and unanimously reaffirmed the *Vaca* standard, and also confirmed that it is truly a tripartite one; that is, that its three components are distinct and that a union's conduct may be measured against any or all of them. 111 S.Ct. at 1132-35.

The court of appeals frankly repudiated *Vaca*'s tripartite standard as a collection of "empty" "buzzwords." (App. 16) In its view, "[t]hese terms are not self-defining. They are conclusions—epithets rather than standards of conduct or tools of analysis." (App. 11). But the court of appeals did more than just disparage the three components of the test. As the judges dissenting from denial of rehearing in banc observed (App. 31), the court "boil[ed] down" the tripartite standard into "a single rationality test" imported from cases arising under the Equal Protection Clause of the Fourteenth Amendment. While this Court did refer to the equal protection cases in *O'Neill* (111 S.Ct. at 1134), it did so only in the context of analyzing whether ALPA's conduct in that case could be char-

acterized as arbitrary. In *Abrams v. Communications Workers*, ____ F.Supp. ____, 143 LRRM 2341 (D.D.C. 1993), the court similarly held that union conduct need only be measured against *O'Neill*'s "wide range of reasonableness" standard.

Other circuits have recognized that the *Vaca* test is tripartite and have applied it in that manner. In *Carter v. Local No. 789*, 963 F.2d 1078, 1082 (C.A. 8 1992), for example, the Eighth Circuit reversed a decision in which:

> the district court held that the union's conduct, as a whole, passed the *ALPA* "wide range of reasonableness" test. In so holding, however, the district court blurred the distinction between the "arbitrary" and "discriminatory" prongs of the *ALPA* test. The "wide range of reasonableness" standard applies only to allegedly *arbitrary* union conduct (emphasis in original).

Since this Court decided *O'Neill*, several other circuits have similarly recognized that "[e]ach of [the] three components of the *Vaca* standard imposes on the union a separate requirement." *Walk v. P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1326 (C.A. 6 1992). *See also, Colon Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933, 940 (C.A. 1 1992) (stating test in disjunctive); *Jones v. Union Pacific R. Co.*, 968 F.2d 937, 941 (C.A. 9 1992) (same).

In *Aguinaga v. United Food and Commercial Workers International Union*, ____ F.2d ____, 143 LRRM 2400 (C.A. 10 1993), the court first set forth *Vaca*'s tripartite standard, then noted that it was obligated to affirm the jury verdict in favor of the plaintiffs "if the evidence supports a finding that the Union acted in *any one* of these three ways. . ." *Id.* at 2404 (emphasis supplied). Unlike the Seventh Circuit here, the Tenth Circuit rejected the

union's argument that "*O'Neill* counsels that the Union be accorded due deference in its decision to sacrifice Plaintiffs' rights," and held that "such deference would only be appropriate insofar as the Union's motive had been proper. . ." *Id.* at 2405.

Indeed, in *O'Neill* itself, while it concluded that ALPA's actions had been rational and therefore not arbitrary, this Court specifically left open the issue of whether ALPA had acted in bad faith. 111 S.Ct. at 1133, n.6. On remand, the Fifth Circuit addressed that issue independent of any claim that ALPA's actions were arbitrary or discriminatory. *O'Neill v. ALPA*, 939 F.2d 1199 (C.A. 5 1991). In yet another recent case involving ALPA, a district court rejected "the premise that the 'arbitrary, discriminatory, or in bad faith' standard enunciated by the Supreme Court in 1967, *Vaca*, 386 U.S. at 190, 87 S.Ct. at 916, and since cited by innumerable courts as a tripartite test, is actually a bipartite 'arbitrary or in bad faith' standard." *Nellis v. ALPA*, 815 F.Supp. 1522, 1533 (E.D. Va. 1993). Thus, as the dissenting judges concluded, the lower court's reformulation of the *Vaca* standard into a single, and universal, minimum rationality test, deviated substantially from the established law of this Court and created a conflict in the circuits.

The Seventh Circuit created a second conflict in the circuits when it applied its reformulated duty of fair representation standard to this case. As noted above, the court assumed for purposes of its opinion that ALPA had not followed its binding merger policy in this case (App. 17), but nevertheless concluded that it had not breached its duty of fair representation. Two other courts have evaluated claims that ALPA breached its duty of fair representation by failing to adhere to the terms of its merger policy and reached the opposite conclusion. In *Ber-*

nard v. ALPA, 873 F.2d 213 (C.A. 9 1989), a case the court below studiously ignored, the Ninth Circuit held that ALPA's failure to adhere to the policy was, by definition, a breach of its duty of fair representation. Unlike the court below, the Ninth Circuit recognized that ALPA's elected representatives made application of the policy mandatory, and the arbitration it compels binding, precisely because they recognized that the union's leadership could not be trusted to exercise its judgment fairly and impartially when confronted with the "difficult task of balancing not just divergent, but polarized, interests" of two union groups. 873 F.2d at 217. In a very recent decision, another court similarly concluded that it would be a breach of its duty of fair representation for ALPA to fail to follow its merger policy (although it determined that ALPA had in fact adhered to the policy in that case). *Nellis v. ALPA*, 815 F.Supp. 1522, 1533 (E.D. Va. 1993). These decisions cannot be reconciled with the decision of the court below that ALPA did not breach its duty of fair representation when it refused to follow its merger policy in this case.

Both of these conflicts arise from fundamental differences among the lower courts with respect to the proper standard for evaluating duty of fair representation cases. The Court should grant the Petition to resolve these important questions regarding the scope of the central protection available to union members against malfeasance by their union.

II.

ALPA BREACHED ITS DUTY OF FAIR REPRESENTATION IN THIS CASE.

The need to resolve the two conflicts in the circuits created by the lower court's decision is not the only

reason the Court should grant this Petition. This case also presents important and recurring issues concerning the scope of each of the three prongs of *Vaca*'s tripartite duty of fair representation standard. With respect to the arbitrariness component, it presents the issue of when, if at all, union leaders can exercise their discretion to deny certain members rights previously guaranteed them by the union through democratic means. The duty of fair representation has always been oriented toward protecting the rights of minorities within the union, and this case presents the issue of when, if at all, a union can discriminate against electoral and political minorities within the union in a merger that requires the consolidation of two previously independent union subunits. It presents claims of bad faith conduct premised on the union's capitulation to threats by one union subunit to secede from the union if it is not allowed to run roughshod over a smaller subunit in a merger of the two, coupled with the union president's desire to advance his own reelection prospects. And it presents the issue of the extent of the employer's liability for secretly cooperating with the union by agreeing to provide the illegal muscle necessary to force the smaller union subunit to capitulate.

A. A union acts arbitrarily when it refuses to comply with the binding dictates of a democratically enacted union policy.

The terms of ALPA Merger Policy bind every member of the union, as ALPA's president and general counsel both conceded (Pl. Ex. 303 at 3; Duffy Tr. at 14; Pl. Ex. 267, ¶8). The policy is just as binding as the union's constitution and bylaws. *Id.* The court of appeals assumed for the sake of argument that ALPA did not follow that

policy here, and erred by declining to find that failure arbitrary within the meaning of *Vaca*.

This Court has recognized the fundamental importance of the promises to the membership contained in a union's constitution and bylaws and other similarly binding declarations of union policy. *Wooddell v. Intern. Broth. of Elec. Workers*, 502 U.S. ____, 112 S.Ct. 494 (1991). The rights contained in such documents provide important safeguards to members who find themselves in electoral or political minorities within the union, and the denial of such fundamental written guarantees is inherently arbitrary.

Thus, in *Adams v. Nagle*, 303 U.S. 532, 543 (1938), this Court held that it would be arbitrary "for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action. . ." In *Steelworkers v. Rawson*, 495 U.S. 362, 372-75 (1990), the Court similarly suggested that it would be a breach of the duty of fair representation for a union to breach duties clearly imposed on it by a collective bargaining agreement. While the promises at issue here are contained in an internal union document, nothing in this Court's analysis in *Rawson* suggests that this difference is significant. The merger policy more than satisfies *Rawson*'s requirement that the document in question clearly give the members rights against the union. *See*, App. 57-89.

Other lower courts have frequently held that violations of the constitution, bylaws or other similarly binding union policies establish a breach of the duty of fair representation. Indeed, as noted above, two courts have so held with respect to the very merger policy at issue here. *Bernard v. ALPA*, 873 F.2d 213 (C.A. 9 1989); *Nellis v. ALPA*,

815 F.Supp. 1522 (E.D. Va. 1993). As the *Nellis* court put it:

> No reported decision has fully come to grips with the competing concerns implicated in protecting the rights of minorities within a union. While the test for impermissible discrimination must be broader than merely arbitrary or bad faith conduct, it cannot be so broad that it unduly disrupts the functioning of democratic decision-making within the union. With these competing concerns in mind, this Court adopts the following proposition: while a union is free to establish its internal policies on the basis of majority rule, the union is not free to ignore properly enacted and promulgated policies whenever such a course is convenient or beneficial to the majority of the union's membership. In other words, a union is bound to follow its official policies unless and until they are amended by means approved under the union's constitution. 815 F.Supp. at 1533.

Many other circuits have also held that a union breaches its duty of fair representation when it intentionally deprives its members of rights guaranteed them by the union constitution, *Ass'n of Contracting Plumbers v. Local Union No. 2*, 841 F.2d 461, 468-69 (C.A. 2 1988); *Alexander v. Intern. U. of Operating Eng., AFL-CIO*, 624 F.2d 1235, 1241 (C.A. 5 1980); *Denver Stereotypers & Electrotypers U. v. NLRB*, 623 F.2d 134, 136-37 (C.A. 10 1980); *Intern. Bro. of Teamsters, Chauffeurs v. NLRB*, 587 F.2d 1176, 1182 (D.C. Cir. 1978); *Goclowski v. Penn Cent. Transp. Co.*, 571 F.2d 747, 758-61 (C.A. 3 1977); *Trail v. International Broth. of Teamsters, Etc.*, 542 F.2d 961, 968 (C.A. 6 1976), or by a collective bargaining agreement. *Aguinaga v. United Food and Commercial Workers International Union*, 143 LRRM 2400, 2404-05 (C.A. 10 1993); *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1438 (C.A. 7 1992).

The court below excused ALPA's departure from its merger policy by noting that the terms of the policy "did not become frozen in 1986, all modification taboo" (App. 17). Here, however, there is no dispute that the merger policy was not actually amended by ALPA's democratically elected representatives and, in context, it is clear that the court of appeals' reference to "modification" meant that ALPA President Duffy was entitled to unilaterally disregard the policy whenever he thought the best interests of the union required it: "Perhaps Duffy was wrong, but a mistake in judgment does not violate the duty of fair representation" (App. 18). This ignores the fact that neither the merger policy nor the union's constitution and bylaws gave ALPA's president discretion to make such judgments. Thus, this is not a case in which the Court must decide how much deference to give a union's good faith interpretation of an ambiguously phrased policy. The court of appeals simply held that all union decisions are entitled to a generalized, and virtually complete, deference. But whatever deference the courts ought to give the judgments of union leaders who are authorized to make them, or who are interpreting an ambiguous policy in good faith, the deference should be much less, if it is given at all, to union leaders who exercise their discretion in bad faith to dispense with the binding mandate of a union policy.

The court of appeals also defended its deference to Duffy's decision to excuse the TWA pilots from the dictates of merger policy on the ground that they were more numerous than the Ozark pilots and that ALPA was therefore entitled to favor their interests (App. 16). But this overlooks the fact that the TWA pilots are not the majority of *ALPA* and the whole point of the merger policy, as the Ninth Circuit recognized in *Bernard* is that the

union's membership made a collective decision to deny its elected leaders the right to exercise this kind of discretion in merger situations. Few, if any, ALPA members can be sure they will not one day find themselves on the minority end of a merger, and it was their collective judgment not to entrust to ALPA's officers the "difficult task of balancing not just divergent, but polarized, interests" when two seniority lists must be merged. 873 F.2d at 217. It is that decision, made to insulate the union's leadership from precisely the kinds of threats to which they succumbed here, that is entitled to judicial deference, not, as the court of appeals believed, the union leadership's decision to "experiment" in defiance of the command of the membership.

Finally, the court of appeals defended its conclusion that ALPA's actions were not arbitrary by pointing to the rationality it perceived in the merger documents themselves (App. 16). The TWA pilots' accurate assessment that they "got 99% of the marbles" in the merger casts considerable doubt on whether the documents are even minimally fair. But even assuming that there was some barely minimal rationality in the documents, this should not have ended the inquiry. In *O'Neill*, this Court held that:

> the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. at 338, 73 S.Ct., at 686, that it is wholly "irrational" or "arbitrary." 111 S.Ct. at 1136.

By the same token where, as here, there is much other evidence of the union's breach of its duty, a minimally rational agreement should not be conclusive evidence, standing alone, that the duty has not been breached.

B. A union acts discriminatorily when it purposefully sacrifices the interests of the smaller, politically weaker of its two bargaining units in a merger.

The basic premise of ALPA's merger policy, as the courts recognized in *Bernard* and *Nellis*, is that mergers place unions in a uniquely difficult position. Rather than negotiating with management to obtain additional benefits for its members, the union must allocate a fixed number of benefits between two union groups. While unions frequently have to decide how they prefer to allocate among their members the benefits management is willing to confer, mergers involve much greater intraunion conflict than do other situations. Layoffs, early retirements, additional hiring and the like may add or subtract names to one end of the seniority list or the other, but mergers involve a rearrangement of two (or more) entire lists. More important, while management is vitally concerned with hirings or layoffs that affect the total number of employees that must be compensated, unless additional training costs are involved, it usually is relatively indifferent to the allocation of a finite number of positions on a list. The employees, on the other hand, care desperately about that allocation. The union consequently finds itself caught in the middle of what is essentially an internal struggle over the allocation of a finite number of benefits between two previously separate and independent groups within the union. Particularly in businesses like the airline industry, which has a long history of mergers and consolidations, the duty of fair representation provides an important safeguard to protect the interest of political and electoral minorities within the union in such situations.

Thus, this Court has suggested that it would be a breach of the duty of fair representation for the union to unfairly discriminate against one of its units when two

of them are involved in a merger, *Humphrey v. Moore*, 375 U.S. 335, 343 (1964), although it found on the facts of that case that the union had acted properly. *See also*, *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970). The lower courts have frequently held that unions breach their duty of fair representation in merger situations when they sacrifice the interests of a smaller, politically weaker group in order to placate a more politically powerful segment of the union, *see, e.g.*, *Air Wisconsin Pilots Protection Com. v. Sanderson*, 909 F.2d 213, 217 (C.A. 7 1990), when they favor existing employees over newcomers in a merger of two union groups, *see, e.g.*, *Beardsley v. Chicago & North Western Transp. Co.*, 850 F.2d 1255, 1268-69 (C.A. 8 1988), or when they cut a secret deal with the employer without the knowledge or consent of the disadvantaged unit within the union. *Id.*; *Volkman v. United Transp. Union*, 724 F.Supp. 1282, 1329-31 (D. Kan. 1989). ALPA did all of these things here, and its discrimination against the Ozark pilots is rooted in its failure to follow its merger policy.

The court of appeals observed, correctly, that the differences between the two pilot groups made it unlikely that they would voluntarily have agreed on a way to merge the seniority lists (App. 4), but flew badly off course with its further observation that ALPA's merger policy "did not seem likely, under the circumstances, to produce agreement within the union either." (*Id.*, 17-18). That, of course, is the policy's *raison d'être*! The policy's provision for mandatory binding arbitration, and its requirement that the union adopt the arbitrator's award as its position in its negotiations with management, provide a mechanism for establishing the union's position when it cannot be reached by agreement of the pilot groups involved. Absent such provisions, the larger pilot group would always exercise

its superior power within the union to enforce its will on the seniority integration process.

While the employing airline is not ordinarily bound by the union's merger policy, the wraparound agreement gave ALPA that leverage here. Moreover, the merger policy commits the union to fight for the seniority list produced by the policy, and there is considerable evidence in the record that here, as in most mergers, TWA would have treated the two pilot groups equally if ALPA had insisted that it do so (Pl. Stmt. of Facts, ¶¶122, 125-26, 140, 159-77). Instead, ALPA declined to either enforce the wraparound agreement or implement its merger policy, then it allowed the TWA pilots to work fist-in-glove with TWA to force the Ozark pilots to accept a date of hire integration.

This is precisely the kind of discrimination in the integration of the seniority lists that both the merger policy and the duty of fair representation were designed to prevent. As the dissenting judges below pointed out, the duty "was created to protect minority interests," and numerous decisions have interpreted it in that spirit, but the decision in this case "disregards all of this by deferring so heavily to majority interests." (App. 31).

C. A union acts in bad faith when it acts to further the electoral prospects of its officers, or capitulates to bad faith threats made by a union subunit, or conspires with the employer to disadvantage another union subunit.

The breadth of the impact of the court of appeals' collapse of the tripartite *Vaca* standard is most clearly evidenced by its complete emasculation of the bad faith prong of the standard. Bad faith has been the touchstone of numerous claimed breaches of the duty of fair representation both in this Court, *Hines v. Anchor Motor Freight*,

424 U.S. 554, 559-60 and n.4 (1976); *Vaca v. Sipes*, 386 U.S. 171, 193-95 (1967), and in the lower courts. *See, e.g., Aguinaga v. United Food and Commercial Workers International Union*, 143 LRRM 2400, 2404-05 (C.A. 10 1993); *O'Neill v. ALPA*, 939 F.2d 1199 (C.A. 5 1991). Moreover, "bad faith" is hardly an "empty buzzword" devoid of content; the courts have frequently and comfortably interpreted that phrase not just in the context of the duty of fair representation, but in many others as well. *See, e.g., Chambers v. Nasco, Inc.*, 501 U.S. ____, 111 S.Ct. 2123 (1991).

Because it was able to articulate a minimally rational basis for ALPA's actions, however, and because its reformulation of the *Vaca* standard requires no more, the court of appeals never had to come to grips with the significance of the bad faith factors which motivated ALPA here. Thus, the court of appeals acknowledged but disregarded the fact that Duffy declined to implement the merger policy only after the TWA pilots threatened to secede from ALPA if he did so (App. 5). It ignored the considerable evidence in the record that Duffy acted as he did to further his own reelection prospects (Pl. Stmt. of Facts, ¶¶80-82). It ignored the clandestine deals in which ALPA agreed to allow the TWA pilots to dictate the merger of the seniority lists and TWA agreed to lay off almost 20% of the Ozark pilots and threaten to lay off the rest of them if they did not accede to the TWA pilots' demand for a date of hire seniority integration.

The lower court's exceptionally deferential standard enabled it to conclude that all of these improper motives were irrelevant in light of Duffy's paternalistic "judgment" that, notwithstanding their repeated and vigorous demands for the implementation of ALPA's merger policy, the interests of the Ozark pilots were best served by

allowing him to "experiment" with it. There is not even a need, the court of appeals held, for a factual determination of what role (if any) this motive actually played in ALPA's decisionmaking, and it was therefore able to resolve this case without a remand for findings of fact. All of this deference is necessary, the court of appeals believed, in order to maintain the delicate balance of power between labor and management: "To say that the union acts in 'bad faith' or 'discriminatorily' when it attempts to shore up the solidarity of labor by eliminating the distinctions managers try to introduce is to curb an important tool by invoking a slogan." (App. 16). The irony, of course, is that the court then proceeded to sanction just the opposite—a covert deal between management and one of two subunits of the union to benefit that subunit at the expense of the other.

Moreover, as the *Rakestraw* petitioners correctly pointed out in their Petition for a Writ of Certiorari (at pp. 18-19), the decisions of this Court in other contexts have repeatedly rejected the view that a single permissible motive trumps two or three or even a dozen impermissible ones. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989); *Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985). In *Hunter*, this Court noted that under the Equal Protection Clause of the Fourteenth Amendment, a showing that an impermissible motive was a "substantial" or "motivating" factor behind a law obligates its defenders to prove that it would have been enacted anyway. 471 U.S. at 228. The Seventh Circuit, which purported to transfer the rationale of these cases wholesale to the duty of fair representation context, applied no such analysis here nor, had it done so, could it have sanctioned ALPA's conduct on summary judgment.

But this Court's decisions suggest that the standard should be even *higher* in duty of fair representation cases. It has characterized the union's duty as requiring "*complete* good faith and honesty of purpose in the exercise of its discretion," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (emphasis supplied), and likened it "to the duty owed by other fiduciaries to their beneficiaries." *O'Neill*, 111 S.Ct. at 1134. Fiduciaries, in Justice Cardozo's famous phrase, are held to "the punctilio of an honor the most sensitive," *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) and, as this Court has observed, "[a] fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.' " *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981), quoting *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 269. See also, *Aguinaga v. United Food and Commercial Workers International Union*, 143 LRRM 2400, 2405 (C.A. 10 1993).

The issue of the proper standard for evaluating and weighing improper union motives in duty of fair representation cases is an important one which this Court ought to resolve.

III.

TWA'S LIABILITY AND THE OTHER COUNTS OF PETITIONERS' COMPLAINT.

Similar to United's role in *Rakestraw* (see Rakestraw Petition for Certiorari at 8, n.4), petitioners here sued TWA for participating in and facilitating ALPA's breach of its duty of fair representation, and because TWA's presence is necessary to "insure complete and meaningful relief." *Glover v. St. Louis-San Francisco Ry.*, 393 U.S.

324, 329 (1969). As the *Rakestraw* petitioners correctly point out, the court of appeals' suggestion that an employer has a virtually absolute right to use economic pressure, even when it does so to facilitate the union's breach of its duty of fair representation, conflicts with this Court's decision in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 569-70 (1976). See also, *Goclowski v. Penn Cent. Transp. Co.*, 571 F.2d 747, 759 (C.A. 3 1977); *Jones v. TWA*, 495 F.2d 790, 798 (C.A. 2 1974). Indeed, it is in cases like this one involving a covert conspiracy between a large union subunit and the employer to force a smaller subunit to accept the larger subunit's terms, that the need for the protection afforded by the duty of fair representation is most acute.

The court of appeals' conclusion that ALPA did not breach its duty of fair representation meant it never had to reach the question of TWA's liability for participating in and facilitating that breach. That conclusion, along with its observation that TWA had an absolute right to use economic pressure, also led the court to hold that the Ozark pilots' vote ratifying the merger documents was an absolute bar to the other claims raised in their complaint. It is, of course, a fundamental principle that unlawful duress, if it is sufficient to overcome an individual's free will, vitiates actions taken while under the duress, *see, e.g., Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67 (1918), and TWA's violations of both its contractual obligations to the Ozark pilots and the *status quo* provisions of the Railway Labor Act clearly qualify as unlawful. The lower court erred in granting TWA an unlimited license to exercise even illegal economic pressure. In petitioners' view, therefore, here, as in *Rakestraw*, should certiorari be granted and the judgment reversed, the issue of TWA's liability should be remanded for fur-

ther consideration. In this case, such a remand would include the question of whether TWA's actions constituted illegal duress sufficient to invalidate the Ozark pilots' vote and therefore justify the entry of judgment against them on their other claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID A. HAMMOND, et al., on his own behalf and on behalf of all individuals similarly situated,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND TRANS WORLD AIRLINES, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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[981 F.2d 1524 (7th Cir. 1992)]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2285, 91-2416, 91-2417, 91-2502,
91-2503, and 91-2535

LEE RAKESTRAW, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

UNITED AIRLINES, INC.,

Defendant-Appellee,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 2325—**Suzanne B. Conlon**, *Judge.*

No. 91-2957

DAVID A. HAMMOND, *et al.*,

Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION and
TRANS WORLD AIRLINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 2792—**George W. Lindberg**, *Judge*.

ARGUED FEBRUARY 24, 1992—DECIDED DECEMBER 28, 1992

Before BAUER, *Chief Judge*, and CUMMINGS and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Two cases present a common question: does a union's duty of fair representation under the Railway Labor Act block the union from adjusting seniority in a way known to favor some employees over others? Both of these cases arise out of trauma at an airline: in one case its acquisition by a larger carrier, and in the other a strike followed by the hiring of replacement pilots.

In each case the union (the Air Line Pilots Association, or ALPA) negotiated with management an agreement providing every pilot with seniority from the date of hire. In the first case, the pilots of the smaller carrier contend that they should have received bonus seniority or equivalent protection (such as denying TWA's pilots seniority credit for time on furlough) to offset the fact that dovetailing the seniority lists worked to the advantage of the larger carrier's pilots, who on average had longer service. In the second case, the pilots hired during the strike contend that another group of pilots should have received seniority from the day they went to work in the cockpit rather than the day they reported for training, in order to protect the positions that they assumed in the face of animosity from the striking pilots.

Judge Lindberg found in the first case that by melding the seniority lists without a bonus for the pilots from the smaller airline the union did not violate its duty of fair representation. Judge Conlon found in the second case that by creating a uniform rule of seniority for all pilots

the union violated its duty to the replacements, who acquired vested rights in an earlier agreement. To obtain the seniority rule, the union had given $200 million in concessions to the carrier. The judge's ruling let the airline keep these concessions while restoring an earlier seniority table—one management strongly favored, as it rewarded pilots who had been loyal to it during the strike.

I

We simplify the facts. Details are irrelevant on the view we take of the union's obligations. Interested persons may glean additional particulars from the district court's opinions, our own prior opinion in the second case, and an opinion of the Supreme Court of Colorado addressing some state-law issues that are not salient here. *Hammond v. Air Line Pilots Ass'n*, 141 L.R.R.M. 2063, 1991 U.S. Dist. LEXIS 13558 (N.D. Ill.); *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474 (N.D. Ill. 1991). See also *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986); *DeJean v. United Airlines, Inc.*, 1992 Colo. LEXIS 981.

A

In 1985 Trans World Airlines was in financial distress. Texas Air Corporation made overtures to acquire TWA. Terrified by the reputation that Texas Air's honcho Frank Lorenzo had acquired for slicing wages, TWA's unions made overtures of their own to other potential acquirers. Eventually the unions cut a deal with Carl Icahn, head of an investment group that acquired TWA. The pilots made sizable concessions, in exchange for which Icahn agreed not to reduce the size of the airline. This agreement, called the "wraparound agreement" because it wraps around the gap between old and new corporate shells, provides among other things that there shall be "no full or partial merger undertaken of the pilot seniority lists of the airline operated by TWA or New TWA . . . and any such other [acquired airline] . . . without prior consent of ALPA".

In 1986 TWA acquired the stock of Ozark Airlines. The pilots at TWA, having made concessions the prior year, wanted job security. They preferred having Ozark's pilots added at the end of TWA's seniority list, as if they had been hired on the date of the merger, but were willing to dovetail the seniority lists, giving each pilot seniority from the date hired by either airline. TWA was an old, shrinking carrier; the pilots still working there had long seniority, while Ozark, a growing regional carrier, had a younger labor force. A merger by date of hire would leave TWA's pilots with the pick of the assignments. The pilots at Ozark understood this. Seeing that melding the seniority list by date of hire would leave them near the bottom, the first to go if TWA continued shrinking, they demanded protection. One common bulwark is slots: for example, if TWA had three times as many pilots as Ozark, then the three most-senior pilots at TWA would be numbers 1 to 3 on the seniority list, the most senior pilot at Ozark would be number 4, positions 5-7 would go to TWA's pilots, position 8 to Ozark, and so on. That method would boost Ozark's senior pilots, hired during a period when TWA was laying off pilots, from puddle jumpers to 747s, and demote some of TWA's captains. Deadlock ensued. TWA's pilots would not yield more than merger by date of hire, and Ozark's pilots stood on their demand for protection.

ALPA has a merger policy providing for arbitration if the two carriers' pilots cannot agree how to merge seniority lists. On behalf of all pilots, ALPA then asks the employer to implement the arbitral award. Ozark's pilots demanded arbitration. Hank Duffy, the president of ALPA, deferred convening the arbitral panel, seeking to mediate the dispute. Meanwhile ALPA did not consent to merger of the seniority lists. TWA then announced that it would operate Ozark's planes with TWA's pilots. TWA wanted Ozark's assets—planes, gates, and landing slots—rather than its labor force. The wraparound agreement barred shrinkage at TWA but not a transfer of planes into TWA. Staring unemployment in the face, Ozark's pilots accepted

a merger of the seniority lists by date of hire, approving the agreement by a vote of 329 to 35. Eventually Ozark's pilots got a slight bonus: ALPA convened an arbitral panel, which established seniority "cells" protecting Ozark's pilots from losing some of the positions they had in the cockpits of Ozark's former aircraft. TWA's pilots received some protective cells in exchange, and these too aggrieve Ozark's pilots. ALPA sought more shelter for Ozark's pilots by lobbying (Congress let the merger proceed) and asking federal regulators for terms that would protect Ozark's pilots as conditions of the acquisition (it lost, *Air Line Pilots Ass'n, Int'l v. Department of Transportation*, 838 F.2d 563, 567 (D.C. Cir. 1988)).

In this litigation a class of Ozark's former pilots accuses ALPA of violating its duty of fair representation under the Railway Labor Act as well as committing offenses under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a). The pilots contend, too, that both ALPA and TWA dishonored their obligations under the wraparound agreement, which would violate the Railway Labor Act. 45 U.S.C. §152 Seventh. Most of plaintiffs' claims emphasize ALPA's departure from its usual "merger policy" and Duffy's supposed toadying to the more numerous TWA pilots, who threatened to secede from ALPA unless they got their way.

After holding the case under advisement for 19 months, the district judge granted summary judgment to ALPA and TWA, adopting the defendants' briefs as his statement of reasons. Judges must give their own reasons and may not adopt parties' briefs. *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990). We remanded the case so that the judge could comply with Circuit Rule 50. The court promptly issued a new opinion explaining that dovetailing is a non-arbitrary objective for a union, that there is no evidence that ALPA's leaders had it in for the Ozark pilots, and that the Ozark pilots' vote undercut most of their remaining contentions. The court also concluded that the wraparound agreement creates rights in favor of TWA's

pilots exclusively, even though it names ALPA as a whole; Ozark's pilots are not third-party beneficiaries.

Adversity has continued at TWA, which is now a debtor in bankruptcy. Seniority turned out to matter greatly. Many of Ozark's former pilots did not last long at TWA. The bankruptcy judge has lifted the automatic stay, permitting this appeal to proceed.

B

United Airlines had hired no pilots since 1979 when, in 1984, it decided to expand its operations. It recruited would-be pilots for training during 1984-85. In a departure from practice, United did not hire them at the start of training but said that the hiring would be effective only when they reported for flight duty. United was negotiating a two-tier wage structure with its existing pilots and sought to hire the new group at the lower rate. Although the trainees were not on the payroll (United was paying their expenses only), they received tentative seniority numbers based on the date their training began.

Negotiations with ALPA did not go well. In April 1985 the National Mediation Board announced an impasse, remitting both sides to their own devices on May 17, 1985. The union called a strike for that date. United directed the trainees (570 of whom completed the program) to report for work on May 17 and proclaimed that anyone who did not do so would never work for United. Only 25 of the 570 reported on May 17; another 6 began to work in the ensuing days.

United also hired replacements for the striking pilots. The new "fleet qualified" pilots—that is, persons already certified by the FAA as able to fly the types of planes in United's fleet—were assured permanent employment at a premium wage. Although new pilots were to receive starting salaries of $22,500 per year under United's two-tier schedule, the carrier offered $75,000 to captains and $50,000 to first officers among the replacements. Relative

seniority, United explained, would depend on when they started and what others did: the replacements would rank behind any of the Group of 570 who worked during the strike, and behind any pilots returning at the end of the strike. Before the strike began, United also told four of the replacements that few of the 570 were expected to report and that it did not plan to hire the others. This implied greater relative seniority for the replacements. Minimum salaries of $75,000 or $50,000 would continue, United promised, even if the replacements' low seniority pushed them back to the third seat in the cockpit. Lower seniority would knock the replacements out of the more desirable planes, positions in the cockpit, routes, and bases, even though they retained their salaries.

United hired 219 fleet qualified pilots, who have seniority dates between May 17 and June 28. During the strike United accepted another group of trainees. Three hundred twenty of these student pilots ultimately went to work, receiving seniority dates in July 1985 as they reported for flight. The 219 fleet qualified pilots and the 320 student pilots have become known as the Group of 539.

The strike ended on June 15, 1985, without a new collective bargaining agreement. The striking pilots returned to work with their original seniority. Members of the Group of 570 who reported during the strike and the 219 fleet qualified replacements retained their positions; the 320 student pilots began work in due course. ALPA and United agreed to disagree about the fate of those in the Group of 570 who had not worked during the strike. United insisted that it would never employ them, and ALPA that this was illegal discrimination on account of concerted activity (that is, honoring the picket lines).

On behalf of the Group of 570, ALPA initiated litigation. Judge Bua directed United to hire any members of this group (called the Group of 500 in that litigation) who still wanted work, with seniority from May 17 (ahead of most of the Group of 539). *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 614 F. Supp. 1020, 616 F. Supp.

849 (N.D. Ill. 1985). United put these trainees on a preferential hire list, and many of them began to work. Our decision the next year, 802 F.2d 886, concluded that the Group of 570 was not protected by the Railway Labor Act after all. That statute applies only to "employees," and members of the Group of 570 did not become employees until they reported for assignments as pilots. 802 F.2d at 910-17. Other parts of the opinion held that the guaranteed salaries for the fleet qualified pilots did not violate the Act, *id.* at 907-10, but that some of United's position bidding practices were illegally discriminatory, *id.* at 898-901.

United threatened to fire those of the Group of 570 who had been hired by virtue of the injunction. Under the Railway Labor Act, the pilots could not threaten a strike in response. With no leverage at the bargaining table, ALPA took the best offer United was willing to make: it would retain strikers from the Group of 570 with a seniority date of November 9, 1985. (November 9 was the date of the preferential hire list required by the district judge's injunction.) ALPA promised that "it will never seek to challenge [United's] action . . . in court or before an arbitrator, nor will it seek to raise the issue of the 'Group of 570' relative seniority position as part of any future negotiations . . . regarding any subject whatsoever." Every working member of the Group of 570 signed a document releasing both United and ALPA from all liability. (The Supreme Court of Colorado has held that the releases are valid.)

United was happy, because pilots who had sided with management during the strike became senior to the members of the Group of 570 who honored the picket lines. Other pilots were dismayed that the replacements were to receive not only premium salaries but also plum bases, routes, and positions in the cockpit. ALPA's leaders promised guerrilla warfare against the fleet qualified replacement pilots, and, if need be to get the 219 replacements, against the entire Group of 539, even though the 320 student pilots had not crossed the picket lines. The 219 were harassed in and out of the cockpits—with the active and

thoroughly illegal support of ALPA's leadership, the district judge found.

Rancor among the pilots and the lack of a collective bargaining agreement drove ALPA and United back to the table. Management came around to the view that efficient operation of the airline required peace with ALPA, and that the price of peace was to reverse the seniority positions of the Groups of 570 and 539. Knowing that the union dearly wanted this reversal, United held out for concessions. In April 1991 labor and management signed a new collective bargaining agreement. In exchange for concessions worth $200 million, ALPA obtained the seniority dates it preferred. All working members of the Group of 570 obtained seniority dates of May 17, 1985, with priority among themselves according to the first date of training. Because United hired no pilots between 1979 and May 17, 1985, this effectively gave the Group of 570 seniority as of the first date of training, which had been United's traditional practice.

Although the fleet qualified replacements kept their salaries, many lost routes, bases, aircraft, and positions in the cockpit they preferred. Instead of giving orders to members of the Group of 570, they were taking orders from them. One hundred three of the fleet qualified replacements filed this suit, contending that ALPA violated its duty of fair representation, that both union and management violated the promise made in the settlement of 1987, and that United broke the promises made to them in 1985.

The district court consolidated a request for a preliminary injunction with the trial of the merits. Judge Conlon ruled in defendants' favor on all claims but one: the duty of fair representation. After finding that "ALPA has nurtured a six-year vendetta against the 539 and the fleet qualified pilots in particular", 765 F. Supp. at 491, the court held that ALPA "unfairly abrogated the legitimately-negotiated seniority status that plaintiffs have relied upon for four years." *Id.* at 493. The court continued:

> Overwhelming evidence demonstrates that ALPA bitterly opposed the very existence of fleet qualified pilots. Plaintiffs have therefore proven by a preponderance of the evidence that in negotiating the 1991 collective bargaining agreement, ALPA unfairly discriminated against the 539, and the fleet qualified pilots in particular.
>
> It is of no consequence that there is a rational basis for granting the 570 . . . seniority as of May 17, 1985. . . . [T]he seniority of the 570 . . . could be logically determined in a number of ways. However, ALPA and United had previously negotiated the 1987 letter agreement as a permanent solution to the dispute over the 570's seniority. . . . ALPA has acted in bad faith in negotiating to reverse the relative seniority rights of the 539 in the 1991 collective bargaining agreement.

Ibid. (paragraph numbers and footnote omitted). In other words, once union and management settle a dispute about seniority, the union's duty of fair representation prevents reopening the issue—for the only outcome is to prefer one group of employees over another in a zero-sum game.

II

Negotiation means compromise. Neither employees as a whole nor particular groups of employees emerge from bargaining with all their wants satisfied. Often unions can achieve more for some of their constituents only by accepting less for others. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.*

v. Huffman, 345 U.S. 330, 338 (1953). See also *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964). It is the "subject always" reservation—coupled with the proposition that "[t]he bargaining representative . . . owes complete loyalty to the interests of *all* whom it represents", 345 U.S. at 338 (emphasis added), "without hostility to any", *id.* at 337—that sets the stage for the disputes in our two cases. What *is* "good faith and honesty of purpose" when a union sacrifices the achievement of some employees' wishes in order to obtain more for other employees?

Some years after *Huffman*, the Court concluded that a union breaches its duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith". *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Until *ALPA v. O'Neill*, 111 S. Ct. 1127 (1991), inferior courts debated whether this standard applies to the negotiation of a collective bargaining agreement as well as to the administration of that agreement; *O'Neill* holds that it does. There remains the problem of identifying "arbitrary, discriminatory, or . . . bad faith" conduct. These terms are not self-defining. They are conclusions—epithets rather than standards of conduct or tools of analysis. When are these labels appropriate? We know from *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-800 (7th Cir. 1976), that a union may not take away the seniority of some employees for no reason other than that the losers have too few votes to affect the outcome of an intra-union election, or that they opposed the union's leadership, and from *Bennett v. Glass Workers Local 66*, 958 F.2d 1429, 1436-39 (7th Cir. 1992), that a union may not sell an employee down the river for no reason at all, or for a reason forbidden on substantive grounds, such as race or internal union politics. See also, e.g., *Camacho v. Ritz Carlton Water Tower*, 786 F.2d 242 (7th Cir. 1986). Thus a union may not disfavor those among its members who voted against its officers in the last election, or employees in the bargaining unit who refuse to join the union (unless there is a valid union security clause). Employees have a statutory right to choose to be represented by unions, or freely to oppose unions. Just as the

employer may not penalize collective action by the workers, so the organized workers may not penalize those who prefer individual to collective decision-making.

A conclusion that a union may not neglect or penalize dissidents pushes the problem to a different plane of generality. What is a forbidden penalty? Ozark's pilots insist that they were "penalized" during the merger of seniority lists because they were not numerous enough to influence ALPA's leaders; the union replies that all pilots were treated equally. The fleet qualified pilots at United insist that they were penalized for replacing striking workers; the union replies that all pilots now have seniority from the beginning of their time (whether training or flight) with the airline, and that at all events the union is entitled to offset the preferences, such as the extra salary, the employer has provided to a favored group of employees. The same acts may be characterized as "bad faith" efforts to take a perquisite away from one group, or as normal efforts to provide a level playing field for all workers. Slogans can be mustered on all sides.

So we are back to the beginning. Bargaining has winners and losers. See *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 917 (7th Cir. 1989); *Merk v. Jewel Companies, Inc.*, 848 F.2d 761, 764-65 (7th Cir. 1988); *Alvey v. General Electric Co.*, 622 F.2d 1279, 1287-90 (7th Cir. 1980). A better retirement plan and other deferred compensation helps older workers at the expense of younger ones, who prefer cash to cover current expenses. Accepting lower fringe benefits (less health insurance, fewer days off) in exchange for higher cash wages helps the majority at the expense of the sick and those whose religious faith requires them to take extra days off. Higher wages assist those who remain with the firm at the expense of workers who may be laid off when the employer loses business to its competitors. Reducing the difference between the wages of skilled and unskilled workers assists the less skilled, who also tend to be more numerous. Unless its leaders are unfathomably dense, the

union knows who wins and who loses. The losers always may say that the union "intended" them to lose. As all of society is an assembly of minorities, the losers can point to some respect (age, sex, religion, politics, skill, health, membership in the union, status during the most recent strike) in which they are in a minority, and insist that the distinction must have been part of a "bad faith" plot to "penalize" them on account of that status. Taken to its limits, the approach prevents the union from resolving differences internally and representing the interests of workers as a group. Yet one of the premises of the Railway Labor Act (like the National Labor Relations Act), and a requirement of the Labor-Management Reporting and Disclosure Act, is that unions act democratically to reach a collective decision—the majority is entitled to prevail. *Humphrey*, 375 U.S. at 349-50; *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944).

Huffman and *O'Neill* show that a conflict among workers does not undercut the union's ability to choose. The union representing Ford's employees negotiated a collective bargaining agreement that counted military service as time with the firm for purposes of seniority, whether or not the worker had been employed by Ford before his military service. This meant that people arriving fresh from the military would leap over some persons who had been at Ford for years. The Court thought this collective bargaining agreement reasonable, even though it contained a further provision giving special protection to union officials. *Huffman*, 345 U.S. at 339, 342. In *O'Neill* the union settled a strike by agreeing to a seniority table that favored replacement employees but secured some slots for the returning strikers. The Court concluded that this agreement was not arbitrary, because it reduced the risk that the returning strikers would get nothing. 111 S. Ct. at 1136.

After *O'Neill*, is the union safe when throwing in the towel but not when fighting for the strikers? Plaintiffs in *O'Neill* were striking pilots who believed that the union had given too much away in the back-to-work agreement.

Unions rarely face charges of being too cozy with management, and the pilots' union has a reputation for being particularly tough. (These cases involve the same union as *O'Neill*, which operates without traditional locals.) *O'Neill* tells us that surrender is OK if the union gets the table scraps and, most likely, even if it does not. When battling fiercely for labor, a union is more likely to encounter a charge of "bad faith"—that it set out to injure those who, by working during a strike, assisted management. If the union as "bargaining representative . . . owes complete loyalty to the interests of all whom it represents", *Huffman*, 345 U.S. at 338, "without hostility to any", *id.* at 337, does it not follow that the union owes "complete loyalty" to the strike breakers? It represents *everyone* in the bargaining unit, after all. Yet the weapons of economic warfare usually are matched. Unions may go on strike, managers initiate lockouts. Unions picket, managers hire replacements. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). If managers may tempt replacements with premium wages and super-seniority, see *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989); *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926, 930-31 (7th Cir. 1982), may the union not try to take these favors away?

Unions commonly demand that "permanent" replacements give way to the returning strikers, and that inducements dangled before these workers be snatched back if they remain employed. Cf. *Aqua-Chem, Inc. v. NLRB*, 910 F.2d 1487 (7th Cir. 1990), rehearing denied, 922 F.2d 403 (1991). Does this violate the union's duty to represent its *enemies* fairly? Must the union, perhaps, advance the interests of the replacements, at the expense of the strikers, once they achieve a majority in the bargaining unit? Premium wages and the like do not violate the labor laws—which provide that employers cannot discriminate against those who engage in concerted action—if we consider the high wages rewards for work, rather than treating normal wages as penalties for rallying 'round the union's standard. Then it follows that efforts by the union to turn

the tables also are not "penalties" for taking sides in the strike, or otherwise evidence of forbidden motive. In *O'Neill* the Court assumed that a union may try to reward the faithful (or at least restore parity) after the strike. Plaintiffs' theory in *O'Neill* was that ALPA had not done "enough" to protect the strikers at the expense of the replacements. Instead of replying that a union is not entitled to do *anything* to advance workers who respect picket lines over those who cross them, the Court explained that the union's decision about how much protection of the strikers is "enough" should be respected unless arbitrary or in bad faith. That must entail the conclusion that the effort to aid one group at the expense of another is not *itself* arbitrary or in bad faith.

Buzzwords such as "bad faith" and "arbitrary" being empty, *O'Neill* analogized the union's choice to that of a legislature, subject to the most deferential judicial review. No one would pretend that cases interpreting the equal protection clause of the fourteenth amendment, which the Court summoned up, 111 S. Ct. at 1135-36, are an integrated whole. But they do give illustrations of both method and result. A legislature may prefer dairy farmers over consumers, *Nebbia v. New York*, 291 U.S. 502 (1934), optometrists over opticians, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and long-time homeowners over newcomers, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), provided only that a rational person might believe that these distinctions serve the interest of the polity as a whole. Cf. *McCann v. Chicago*, 968 F.2d 635 (7th Cir. 1992). Slapping the label "bad faith" or "discrimination" on a classification that is rationally related to a legitimate objective does not alter the analysis. A discriminatory motive without a discriminatory rule does not condemn a statute. *Palmer v. Thompson*, 403 U.S. 217 (1971); cf. *McGowan v. Maryland*, 366 U.S. 420 (1961) (rule rationally related to legitimate objective not spoiled by religious motivation of some sponsors). Knowledge that some groups gain or lose as a result of a rule does not even amount to a discriminatory motive. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

Unions legitimately may try to advance the interests of labor at the expense of investors and consumers. Success in this endeavor requires concerted action. That is to say, unions have been authorized to use the tools of cartels, and success depends on concerted action, including dealing with "cheaters." Whatever undercuts concert among labor reduces the effective wage unions can secure. Managers try to undermine labor's position by divide-and-conquer tactics: by individual negotiations, by favors for their friends. To say that the union acts in "bad faith" or "discriminatorily" when it attempts to shore up the solidarity of labor by eliminating the distinctions managers try to introduce is to curb an important tool by invoking a slogan. There are limits on what labor can do in response to management. Unions may not shoot strike-breakers, and we may assume that they may not negotiate for wage scales the mirror image of managers' preferred systems (that is, a collective bargaining agreement may not provide that workers who respected the picket line, or joined the union, receive a premium over others). Beyond these limits, workers generally may decide by majority vote where their interests lie.

III

A rational person could conclude that dovetailing seniority lists in a merger, treating service at either firm as of equal weight, without quotas or other preferences for either group of employees, serves the interests of labor as a whole. Seniority lists sometimes are endtailed. That is, the employees of the smaller firm are given seniority only from the date of the acquisition, effectively added at the end of the larger firm's seniority roster. Contentions that endtailing violates the union's duty have been unsuccessful. *Frandsen v. Railway Clerks*, 782 F.2d 674 (7th Cir. 1986); *Schick v. NLRB*, 409 F.2d 395 (7th Cir. 1969). The propriety of dovetailing, treating the two groups identically, follows directly. If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm.

Equal treatment does not become forbidden because the majority prefers equality, even if formal equality bears more harshly on the minority. Cf. *Employment Division v. Smith*, 494 U.S. 872 (1990). These principles dispose of the Ozark-TWA case.

The former Ozark pilots emphasize that ALPA did not follow the "merger policy" it developed to ensure both equal treatment and solidarity. For the sake of assessing their argument, we assume that the belated reference to arbitration means that ALPA did not "follow" its "merger policy." Adhering to this policy insulates the union against a charge that advocating the arbitrators' award in negotiations with the employer violates the duty of fair representation. *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 216-17 (7th Cir. 1990). It does not follow that deviation exposes the union to liability. Policies do not spring to life fully grown, as from the brow of Zeus. Like the common law, ALPA's "merger policy" is the result of evolution, of experimentation and change when circumstances warrant. It did not become frozen in 1986, all modification taboo.

Union officials hoped to bridge the gap between Ozark's and TWA's pilots without litigation—and arbitration is a form of litigation. Cramming the "merger policy" down the throats of an unwilling cadre at TWA could have been calamitous for Ozark's pilots, because TWA held all the cards. It was free under the wraparound agreement to acquire Ozark's planes and put TWA's pilots to work in their cockpits. TWA's pilots would have been delighted. The union's agreement was needed only for a formal merger of seniority lists; TWA demonstrated both ability and willingness to conduct the transaction as an asset acquisition, leaving the shell of Ozark as a subsidiary. TWA did not need Ozark's pilots and was hardly likely to offend its own pilots by arranging the transaction in a way that favored Ozark's. ALPA's "merger policy" could not compel TWA to agree to anything, and it did not seem likely, under the circumstances, to produce agreement within the

union either. So ALPA experimented, emphasizing negotiations between representatives of the two groups rather than what Duffy feared would be premature intra-union litigation. Perhaps Duffy was wrong, but a mistake in judgment does not violate the duty of fair representation.

All of the Ozark pilots' remaining contentions, variously expressed in terms of the Railway Labor Act, the LMRDA, and the wraparound agreement, founder on their own vote in favor of the merger and the ensuing new collective bargaining agreement. ALPA did not give the consent required by the wraparound agreement until Ozark's pilots voted in favor of the merger with dovetailed seniority lists. (Because Duffy's consent on behalf of ALPA satisfied the conditions of the wraparound agreement, it is unnecessary to decide whether the union as a whole, or only TWA's pilots, possesses entitlements under it.) According to Ozark's pilots, we should disregard their approval because it was given under duress: TWA had transferred four planes to itself, furloughed 86 Ozark pilots, and was threatening to move the rest of the fleet in the same way. Straightened circumstances these were, but a decision to make the best of a poor position does not vitiate a choice. *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987). TWA, not the union, was applying the screws. TWA had every right to use economic pressure. To treat the pilots' response as voidable, making their vote a one-way street in which they could reap any benefit but would surrender nothing, would ensure that employers paid no heed to unions' promises in the future. A group disabled from making binding concessions cannot expect anything in return. One of the principal objectives of labor law is peaceful, which is to say contractual, resolution of differences. When one side may abandon its promises by pleading hard circumstances, the institution of contract and all its benefits are imperiled.

The Ozark pilots' reformulation of their contention as a challenge to their "exclusion" from the TWA pilots' voting on the new collective bargaining agreement is puzzling. At the time TWA's pilots voted, Ozark's pilots were

insisting that they had a binding agreement with Ozark and did not want to vote on another. You can't complain that you were "excluded" from an election you boycotted! Had every Ozark pilot voted "no," the TWA pilots' affirmative votes would have carried the day. Setting aside a foredoomed outcome because of irregularities in the voting cannot be justified. Cf. *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761-66 (1991). A wrong is actionable only when it causes injury; here the TWA pilots' support for the agreement, rather than any legal wrong done to the Ozark pilots, is a sufficient cause of the final collective bargaining agreement. But, as we have said, no wrong was done. Ozark's pilots eventually stopped sulking, voted, and approved the pact. A voluntary choice may not be withdrawn because the choice was an effort to make the best of a bad situation. Adult pilots, of sound mind and well aware of the consequences of their acts, must expect to keep their contracts, even when they wish they could have made better deals.

IV

ALPA's leadership, like many of United's pilots, detested the strike-breakers and wanted revenge, by means fair or foul. This loathing played a role in the union's efforts to increase the seniority of the Group of 570, which would demote the fleet qualified pilots. Giving the Group of 570 seniority from May 17, 1985, *also* demoted the 320 trainees, none of whom crossed the picket lines and many of whom have joined the union, but the district judge's findings of fact—none of which is clearly erroneous—establish that the union was willing to pay this price to get back at the reviled 219 replacement pilots.

The district court believed that a retaliatory motive rendered it "of no consequence that there is a rational basis for granting the 570 . . . seniority as of May 17, 1985." 765 F. Supp. at 493. Even on the assumption that a bad motive spoils an agreement rationally serving the interests of labor as a whole, the district court's conclusion does

not necessarily follow. ALPA had mixed motives. It wanted to harm the replacements, but it also wanted to restore the normal seniority arrangements at United—the arrangements that had been in place for many years before United started training the Group of 570, that were part of the union's proposals before the strike, and that United honored in part when assigning the trainees tentative seniority numbers based on the dates they began training. Would the union have held out for giving the Group of 570 seniority as of May 17 had there been no replacement pilots, leaving the 320 trainees the only losers? If yes, then it is hard to chalk up the seniority arrangement to a bad motive. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Cf. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87 (1977). The district judge did not discuss the dual-motive problem.

For the reasons developed in Part II of this opinion, however, a "bad" motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union. The 219 fleet qualified pilots fared no worse than the 320 trainees, and both the 570 and the 539 received seniority slots that would had been forthcoming under United's pre-strike practices. Plaintiffs all but concede that United and ALPA could have agreed in their back-to-work agreement that all members of the Group of 570 employed by United would receive seniority as of May 17 (with priority among themselves according to their first date of training), and that union and management could have reached the same settlement in 1987, after we reversed Judge Bua's injunction. See *TWA v. Flight Attendants*, 489 U.S. at 435-37; *Belknap, Inc. v. Hale*, 463 U.S. 491, 513-14 (1983) (Blackmun, J., concurring). Hostility is common in strikes, especially when some people cross the picket lines. Solutions often involve adjusting the positions of those who did and did not work during the strike. To say that antipathy toward the strikebreakers forbids the union from advocating the cause of

its adherents would make the settlement of strikes much harder. The Norris-LaGuardia Act put the federal courts out of the business of protecting employers and strike-breakers against unions. Nonetheless, plaintiffs submit, everything changed when ALPA capitulated in 1987. Thereafter they had vested rights, which the union could no more change than it could invade their bank accounts to finance its operations.

Once a seniority system is in place, many employees come to think of their position in the pecking order as a form of property. Higher seniority means more desirable assignments and greater security of employment. Preventing jolts to these expectations is an objective the legal system shares with the parties. E.g., *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 (1989). Yet seniority does not "belong" to an employee, any more than he "owns" the prospect of receiving a given wage next year or flying the St. Louis-Paris route rather than the leg from Minneapolis to Duluth. Seniority is a creation of collective bargaining agreements and equivalent contracts between unions and employers. When these expire, employers are free to use other criteria, such as merit, to assign jobs and decide who will be let go in hard times. Like wages and fringe benefits, seniority is a legitimate subject of discussion and compromise in collective bargaining. *Schick v. NLRB*, 409 F.2d 395, 398 (7th Cir. 1969); *Food Workers Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990).

Barton Brands holds that a union may not juggle the seniority roster for no reason other than to advance one group of employees over another. The change must rationally promote the aggregate welfare of employees in the bargaining unit. 529 F.2d at 800. ALPA had at least two rational and appropriate objectives from this perspective: (1) to reduce the advantages enjoyed by the replacements, and thus to strengthen the hand of organized labor in future conflicts with management, and (2) to restore the seniority system that United had long used. The first shores

up the monopolistic quality of organized labor. The second recognizes that stability is itself a legitimate objective, for the reasons given in *Nordlinger* and *McCann*. Management also had legitimate reasons to agree to the request: labor gave concessions worth $200 million, and the alteration of the seniority tables reduced (although it could not eliminate) the friction among pilots that was hampering operations.

ALPA's promise in 1987 that "it will never seek to challenge [United's] action . . . in court or before an arbitrator, nor will it seek to raise the issue of the 'Group of 570' relative seniority position as part of any future negotiations . . . regarding any subject whatsoever" may create contractual rights, but it does not change the elements of the union's duty of fair representation. And it does not create contractual rights enforceable in court by the Group of 539. Parties to an agreement—only ALPA and United signed this one—may change their minds and negotiate anew. If the 1987 agreement creates rights that the Group of 539 may enforce as third-party beneficiaries, the parties' disagreement is a "minor dispute" that must be submitted to an arbitral panel under the Railway Labor Act. 45 U.S.C. §184. We need not decide whether this is appropriate, because the Group of 539 has spurned the procedures under the Railway Labor Act. As for the future: ongoing accommodation is a hallmark of labor relations. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 308-09 (1989); *Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960); *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 273-74 (1958). "Forever" in labor relations means "until the next collective bargaining agreement." Excepting vested rights, a promise lasts only until renegotiation or the expiration of the agreement. *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215, 2226 (1991).

Pledges of the sort ALPA made in 1987 do have one important effect: they remove the topic as a mandatory

subject of collective bargaining. *Battle v. Clark Equipment Co.*, 579 F.2d 1338, 1347 (7th Cir. 1978). United could wave off any effort by the union to negotiate concerning the Group of 570's seniority position. Parties may not negotiate to impasse over a topic that is a permissive rather than a mandatory subject of collective bargaining, and in consequence failure to reach agreement may not be the basis of a strike or lockout. In order to make headway on a permissive subject of bargaining, a party must offer something valuable in return. That is what happened; ALPA paid through the nose for a change in the seniority table. United obtained favorable terms that enabled it to expand its operations—incidentally creating more positions for pilots.

Remaining contentions require only a few comments, because we generally agree with the district court's disposition of them. 765 F. Supp. at 494-97. The fleet qualified pilots contend that United violated its contracts with them when putting them behind the Group of 570. But the written contracts are conspicuously silent about seniority. United promised permanent employment at a premium salary and has lived up to these commitments. Oral statements about probable seniority rankings were predictions, not promises; the contracts state that the only promises are those written down. United told some replacements that members of the Group of 570 who did not work during the strike would never work at all. Until a district judge issued an injunction, United adhered to this position—which again was not part of the written contract.

Recasting the argument as a contention that ALPA wrongfully interfered with the contracts between United and the replacement pilots adds nothing. United kept its contracts. Anyway, a principal purpose of unions is to interfere with—indeed to eliminate—direct bargaining between firms and their workers. It is equally futile to charge United with "conspiring" with ALPA to violate its duty of fair representation. There was no violation. Employers are free to prefer one group of employees over another;

the fleet qualified pilots, as recipients of a hefty preference, are in no position to protest that offsetting benefits have been ceded to another group. And it preposterous to depict *United* as hostile to the fleet qualified pilots. It wanted to save money and reduce strife among its pilots, recognizing that doing so weakened management's hand in any future conflict.

The judgment of the district court in the Ozark-TWA dispute is affirmed. The judgment of the district court in the United case is reversed to the extent it enjoins implementation of the seniority provisions of the 1991 collective bargaining agreement. The remainder of the judgment is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: December 28, 1992

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge

No. 91-2957

DAVID A. HAMMOND, TERRY D. ATKINS, KENNETH N. BALDWIN, et al.,

Plaintiffs-Appellants

v.

AIR LINE PILOTS ASSOCIATION and TRANS WORLD AIRLINES, INCORPORATED,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 87 C 2792, Judge George W. Lindberg

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2285, 91-2416, 91-2417, 91-2502,
91-2503, and 91-2535

LEE RAKESTRAW, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

UNITED AIRLINES, INC.,

Defendant-Appellee,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant-Appellant, Cross-Appellee.

No. 91-2957

DAVID A. HAMMOND, *et al.*,

Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION and
TRANS WORLD AIRLINES, INC.,

Defendants-Appellees.

ON PETITIONS FOR REHEARING

DECIDED APRIL 6, 1993

Before BAUER, *Chief Judge*, and CUMMINGS and EASTERBROOK, *Circuit Judges*.

Petitions for rehearing were filed by the plaintiffs in each of these two consolidated cases. All of the judges on the panel voted to deny rehearing, and the petitions are accordingly denied.

A judge in active service called for a vote on the suggestions of rehearing in banc, which failed to obtain a majority. Judges Flaum and Ripple voted for rehearing in banc.

RIPPLE, *Circuit Judge*, with whom FLAUM, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc.

The district court held that Air Line Pilots Association ("ALPA") had breached its duty of fair representation ("DFR") in the *Hammond* case, and that it had not breached its DFR in the *Rakestraw* case. On appeal, the panel held that ALPA had not breached its DFR in either case. The plaintiffs in both cases have petitioned for rehearing with suggestion for rehearing en banc. At issue is the standard the panel employed in determining that ALPA had not breached its DFR. Because the panel's analysis deviates from established law of the Supreme Court and this court, and because it places this circuit in conflict with other circuits, the petition for rehearing en banc should be granted.

The panel opinion deviates from the standard that the Supreme Court has established for DFR cases. The standard was originally set out in *Vaca v. Sipes*, 386 U.S. 171 (1967). There, the Court found that a breach of DFR "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190. The Court recently affirmed that *Vaca*'s standard is indeed the proper test for DFR cases: "Although there is admittedly some varia-

tion in the way in which our opinions have described the unions' duty of fair representation, we have repeatedly identified three components of the duty . . ." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 111 S. Ct. 1127, 1134 (1991). In addition to affirming *Vaca*'s three-part standard, the Court clarified that "a union breaches its duty of fair representation if its actions are *either* arbitrary, discriminatory, or in bad faith." *O'Neill*, 111 S. Ct. at 1130 (emphasis added). The Court thus characterized the test as a "tripartite standard." *Id.* at 1135.

The courts of the various circuits have employed this tripartite test and have recognized that a union's conduct must be evaluated separately under each of its three components. For example, in *Colon Velez v. Puerto Rico Marine Management, Inc.*, the First Circuit noted that a union breaches its DFR "if its actions are *either* arbitrary, discriminatory, or in bad faith." 957 F.2d 933, 940 (1st Cir. 1992) (emphasis added). *Accord Carter v. Local No. 789*, 963 F.2d 1078, 1080 (8th Cir. 1992); *Perry v. Million Air*, 943 F.2d 616, 619 (6th Cir. 1991). In *Carter*, the court was clear that the three components must be evaluated separately. There, the court stated that the district court erred when it evaluated the union's conduct under a single "reasonableness" test that "blurred the distinction between the 'arbitrary' and 'discriminatory' prongs of the test." *Carter*, 963 F.2d at 1082.

Prior to *Rakestraw* and *Hammond*, we dutifully employed the tripartite test. In *Ooley v. Schwitzer Division, Household Manufacturing, Inc.*, 961 F.2d 1293 (7th Cir.), *cert. denied*, 113 S. Ct. 208 (1992), the court cited *O'Neill* and noted that "the standard is a tripartite standard where the courts should look to each component separately rather than merging the test into a single requirement of honesty and good faith." *Ooley*, 961 F.2d at 1302. The court then went on to evaluate the union's behavior in light of each of the three components. In *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1436 (7th Cir. 1992), we also recognized that the test was a "tripartite standard."

Despite the court's previous—and recent—adherence to the well-established tripartite standard, the panel in *Rakestraw* and *Hammond* did not apply it. The panel started down the right path by stating that in *Vaca* the "Court concluded that a union breaches its duty of fair representation if its actions are arbitrary, discriminatory, or in bad faith." *Rakestraw v. United Airlines, Inc.*, Nos. 91-2285, 91-2416, 91-2417, 91-2502, 91-2503, 91-2535, slip op. at 11 (7th Cir. Dec. 28, 1992). However, the panel quickly left that path and dismissed the standards of the tripartite test as "conclusions—epithets rather than standards of conduct or tools of analysis." *Id.* At no point in the opinion did the panel break down its analysis into an examination of the three discrete parts of the established test. The panel even suggested that *O'Neill* itself did not follow the tripartite test: "Buzzwords such as 'bad faith' and 'arbitrary' being empty, *O'Neill* analogized the union's choice to that of a legislature, subject to the most deferential judicial review." *Rakestraw*, slip op. at 15. The panel used this deferential standard throughout its analysis. What the panel failed to recognize is that *O'Neill*'s analogy related only to the arbitrary prong of the tripartite test. *O'Neill* instructs that "a union's actions are *arbitrary* only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 111 S. Ct. at 1130 (emphasis added).

All of *O'Neill*'s references to deference and "a wide range of reasonableness" relate only to whether the union acted arbitrarily, not whether it acted discriminatorily or in bad faith. Each prong is a separate inquiry. The panel erred in applying this deferential standard across the board. The same error was made by the district court in *Carter*. Reversing the district court, the Eighth Circuit stated, "the district court held that the union's conduct, as a whole, passed the [*O'Neill*] 'wide range of reasonableness' test. In so holding, however, the district court blurred the distinction between the 'arbitrary' and 'discriminatory' prongs of the [*O'Neill*] test. The wide range of reasonableness

standard applies only to allegedly *arbitrary* union conduct." *Carter*, 963 F.2d at 1082 (emphasis in original).

In *Ooley*, this court recognized that *O'Neill*'s deference only applies to the "arbitrary" prong. The court stated that "a union only violates the arbitrary prong of the analysis when the union's actions are so far outside a wide range of reasonableness . . ." *Ooley*, 961 F.2d at 1302. After finding that the union had not acted arbitrarily under this "extremely deferential standard," the court went on to say that "[i]t seems to be a different question, however, whether or not" the union acted discriminatorily or in bad faith. *Id.* at 1303. Also, in *Bennett*, this court recognized the tripartite standard and noted that *O'Neill* held that "a union's actions are *arbitrary* only if they fall outside a 'wide range of reasonableness.' " *Bennett*, 958 F.2d at 1436 (citing *O'Neill*, 111 S. Ct. at 1130) (emphasis added).[1]

Rather than using the tripartite standard, the panel in effect boils down the inquiry into a single factor: If the union acted so as to benefit the workers as a whole, then it did not breach its DFR. This is a by-product of the panel's use of a single rationality test. An examination of the opinion shows that it is replete with deference to majority rule. The panel said: "Negotiation means compromise." *Rakestraw*, slip op. at 10; "Bargaining has winners and losers." *Id.* at 12; "the majority is entitled to prevail." *Id.* at 13; and "If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm." *Id.* at 16. The panel says:

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[1] Even if the "mixed motive" analysis used elsewhere, *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), can be transferred in wholesale fashion to fair representation cases, the test was never applied by the district court. There is no basis for the conclusion that, absent an impermissible motive, the union would have followed the same course. As the panel appears to acknowledge in *Hammond* and *Rakestraw*, slip op. at 20, a mixed motive analysis can even be attempted only if one accepts the panel's collapse of the three-part test.

> [t]here are limits on what labor can do in response to management. Unions may not shoot strikebreakers, and we may assume that they may not negotiate for wage scales in the mirror image of managers' preferred systems . . . . Beyond these limits, workers may decide by majority vote where their interests lie.

Id. at 16.

All of this deference ignores that the concept of the duty of fair representation was created to protect minority interests, and by necessity, places a limit on majority rule. In the case that set forth the principle of the DFR under the Railway Labor Act, the Supreme Court said, "the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944). As the Second Circuit noted in *Haerum v. ALPA*, "[t]he objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit." 892 F.2d 216, 221 (2d Cir. 1989) (citing *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974)).

Indeed, we rejected the idea of rote majority rule in *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 958 (1991). We stated that "[m]inority rights imply a limitation on the rights of the majority" and "the legal duty of fair representation is oriented toward the concerns of minorities . . . or a group of dissidents on the outs with the union leadership whom the leadership seeks to punish . . . ." *Air Wisconsin*, 909 F.2d at 216, 217. The court has also found that seniority decisions "may not be made solely for the benefit of a stronger, more politically favored group over a minority group." *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976).

The panel's analysis in *Rakestraw* and *Hammond* disregards all of this by deferring so heavily to majority interests. By not employing the tripartite standard, the

panel has deviated from the established law of the Supreme Court and the Seventh Circuit, and it has placed this circuit in conflict with other circuits. Every circuit that has faced this issue since *O'Neill* has accepted the tripartite standard and has recognized that *O'Neill*'s phrase "outside a wide range of reasonableness" applies only to the arbitrary prong. *See Carter*, 963 F.2d at 1078; *Colon Velez*, 957 F.2d at 940; *Ackley v. Local Union 337*, 948 F.2d 267, 267 (6th Cir. 1991); *Perry*, 943 F.2d at 619. The panel's opinion here cannot be squared with these cases. I therefore respectfully dissent from the denial of rehearing en banc.[2]

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Clerk of the United States Court of Appeals for the Seventh Circuit

[2] As Judge Wood pointed out in *Ooley*, this circuit has already been criticized by the Supreme Court for its crabbed interpretation of the duty of fair representation. 961 F.2d at 1302 n.7 (citing *O'Neill*, 111 S. Ct. at 1134).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 8, 1993.

Before
Hon. KENNETH F. RIPPLE, *Circuit Judge*

Nos. 91-2285, 91-2416, 91-2417,
91-2502, 91-2503, and 91-2535

LEE RAKESTRAW, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

UNITED AIRLINES, INC.,
Defendant-Appellee,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendant-Appellant,
Cross-Appellee.

On Petitions
for Rehearing
Decided
April 6, 1993

No. 91-2957

DAVID A. HAMMOND, et al.,
Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION and
TRANS WORLD AIRLINES, INC.,
Defendants-Appellees.

ORDER

The slip opinion issued on April 6, 1993 denying the petitions for rehearing en banc with a dissent from the denial is corrected as follows:

On page 2, paragraph 1 of the dissent, line 1, is amended to read:

> The district court held that Air Line Pilots Association ("ALPA") had breached its duty of fair representation ("DFR") in the *Rakestraw* case, and that it had not breached its DFR in the *Hammond* case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Robert F. Coleman
Robert F. Coleman & Associates
Three First National Plaza
Suite 5310
Chicago, IL 60602

Case Number: 1:87-cv-02792

Title: Hammond, Etal v. Air Line Pilots Ass'

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 8/9/91 before Honorable George W. Lindberg: The motions for summary judgment [229-2] of defendants Airline Pilots Association and Trans World Airlines, Inc., are both granted. Judgment is entered in favor of defendants, Airline Pilots Association and Trans World Airlines, Inc., and against plaintiffs. terminating case Notice mailed 08/12/91.

This order was entered on the docket by the Clerk August 12, 1991

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 10, 1991

BEFORE:

Hon. William J. Bauer, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

DAVID A. HAMMOND, TERRY D. ATKINS, KENNETH N. BALDWIN, et al.,

Plaintiffs-Appellants,

No. 91-2957 v.

AIR LINE PILOTS ASSOCIATION and TRANS WORLD AIRLINES, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 2792, George W. Lindberg, Judge.

This matter comes before this Court for its consideration of the following:

1. "MOTION FOR WAIVER OF SEVENTH CIRCUIT RULE 50 OR, ALTERNATIVELY, FOR SUMMARY REVERSAL" filed August 23, 1991, by counsel for appellants.

2. "TWA'S RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION FOR WAIVER OF SEVENTH CIRCUIT RULE 50 OR, ALTERNATIVELY, FOR SUMMARY REVERSAL" filed August 30, 1991, by counsel for appellee Trans World Airlines.

3. "RESPONSE AND OPPOSITION OF DEFENDANT-APPELLEE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL TO PLAINTIFFS-APPELLANTS' MOTION FOR WAIVER OF SEVENTH CIRCUIT RULE 50 OR, ALTERNATIVELY, FOR SUMMARY REVERSAL" filed August 28, 1991, by counsel for appellee Air Line Pilots Association.

As all three parties recognize, this court ordinarily remands actions when the district court fails to state the reasons for granting summary judgment. Circuit Rule 50; *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990). Nevertheless, the parties ask us to waive Rule 50 and proceed to briefing. We note that the district court has recently issued a minute order providing some of the reasons for granting summary judgment. However, the order is admittedly incomplete, representing only the highlights of the judge's reasoning. We need the full picture. Therefore, we think it prudent to follow Rule 50 and therefore we decline the parties' suggestion for waiver. Accordingly, this case is remanded for the limited purpose of allowing the district court to enter a complete statement of his reasons for granting summary judgment. We respectfully request that Judge Lindberg enter his findings by no later than 10/3/91.

Failing a waiver of Rule 50, the appellant's alternative request is for this court to summarily reverse the district court. However, the appellant fails to address the merits of the underlying decision, and in light of our remand pursuant to Rule 50, the appellant's motion is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Robert F. Coleman
Robert F. Coleman & Associates
Three First National Plaza
Suite 5310
Chicago, IL 60602

Case Number: 1:87-cv-02792

Title: Hammond, Etal v. Air Line Pilots Ass'

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 9/10/90 by Hon. George W. Lindberg: The court, sua sponte, enters this order further explaining the ruling granting the motions for summary judgment [229-2] of defendants Airline Pilots Association and Trans World Airlines, Inc. Mailed notice.

This order was entered on the docket by the Clerk September 11, 1991

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

ORDER

For the guidance of the parties, the court provides this explanation of the most significant of its reasons for granting the motions for summary judgment of defendants Airline Pilots Association and Trans World Airlines, Inc. This is not an exhaustive statement of all of the reasons for granting those motions.

The court is of the opinion that certain critical material facts are not genuinely in dispute and favor defendants. First, there is no genuine issue as to the material fact that defendant Airline Pilots Association did not breach its duty of fair representation. Second, there is no genuine issue as to the material fact that the Ozark pilots were not coerced in any manner that would vitiate their overwhelming vote of approval of the agreement. It was the weakness of their bargaining position rather than any improper conduct by defendants that resulted in the Ozark pilots' large vote of approval. Third, there is no genuine dispute that the Ozark pilots voted overwhelmingly in favor of approval of the terms of which plaintiffs complain.

The court is of the opinion that the combination of (1) no breach by defendant Airline Pilots Association of its duty of fair representation; (2) no coercion of the Ozark pilots which would vitiate their vote of approval of the terms; and (3) the overwhelming approval by the Ozark pilots of the terms is fatal to plaintiffs' claims.

As noted at the outset, the foregoing is provided to supply guidance to the parties as to the most important of the reasons for the court's grant of summary judgment in favor of the defendants. Additional reasons for the court's ruling may be found in the arguments of defendants in their memoranda in support of their motions for summary judgment.

/s/ GEORGE W. LINDBERG

[Dated September 26, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID A. HAMMOND, TERRY D. ATKINS, KENNETH N. BALDWIN, GREGORY N. DOHRN, K. RICHARD KLOEPPEL, H.M. SMITH on their own behalf and on behalf of a class of all other persons similarly situated, Plaintiffs, -vs- AIR LINE PILOTS ASSOCIATION and TRANS WORLD AIR-LINES, INC., Defendants.	)	No. 87 C 2792 Judge George W. Lindberg

MEMORANDUM

This court granted summary judgment in favor of defendants, Air Line Pilots Association (ALPA) and Trans World Airlines, Inc. (TWA), and against plaintiffs on all counts of the five-count second amended complaint. Plaintiffs appealed and the court of appeals remanded to this court for the limited purpose of this court's entering a statement of its reasons for granting summary judgment. This memorandum is that statement.

This action arises out of the merger of Ozark Airlines, Inc. (Ozark), into TWA. It was brought by several Ozark pilots on behalf of the Ozark pilots as a class. Plaintiffs' action is premised upon their being treated improperly by both defendant TWA and their union, defendant ALPA, in connection with the merger and its aftermath.

The second amended complaint's five counts alleged the following claims: 1) a breach of ALPA's duty of fair representation claim directed at both ALPA and TWA; 2) a breach of a contract known as the "Wraparound Agreement" directed at both ALPA and TWA; 3) a violation of sections 101(a)(1) and 101(a)(2) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC §§ 411(a)(1), 411(a)(2), claim directed at ALPA only; 4) a breach of the Ozark-ALPA collective bargaining agreement (Ozark-ALPA CBA) claim directed at TWA only; and 5) a violation of the Railway Labor Act (RLA) claim directed at TWA only.

The law applicable to rulings on motions for summary judgment is well established. Summary judgment should be rendered:

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FRCP 56(c). The moving party bears the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Adickes v S.H. Kress & Co.*, 398 US 144, 157, 90 S Ct 1598, ____, 26 L Ed 2d 142, ____ (1970). A court in ruling on a motion for summary judgment will draw all reasonable inferences from the facts favorable to the nonmoving party. *Hermes v Hein*, 742 F2d 350, 353 (7th Cir. 1984). However, the nonmoving party bears a burden with respect to issues on which it has the burden of proof. As the 7th Circuit has said:

> Summary judgment is appropriate where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case,

> and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). . . . The summary judgment standard "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." [*Anderson v. Liberty Lobby Inc.*, 477 US 242, ___, 106 S Ct 2505, 2511, 91 L Ed 2d 202, ___ (1986)].

Teamsters Local 282 Pension Trust Fund v Angelos, 839 F2d 366, 369-70 (7th Cir 1988).

Plaintiffs cannot prevail against either defendant on the first count of the second amended complaint unless they can prove a breach by ALPA of its duty of fair representation. In order to prevail on this claim then it would be necessary for plaintiffs to prove that ALPA's actions were arbitrary, discriminatory, or in bad faith. *Air Line Pilots Association, International v O'Neill*, ___ US ___, ___, 111 S Ct 1127, 1130, 113 L Ed 2d 51, ___ (1991). Plaintiffs, in their response to ALPA's citation of *O'Neill* as new authority, contend that ALPA's actions were all three.

Plaintiffs contend that ALPA acted arbitrarily in that:

> At the time of the TWA/Ozark merger, ALPA had in place a binding merger policy. . . . That policy established specific procedures which ALPA had committed itself to follow in all mergers between two ALPA carriers. . . . At bottom, the policy required that the two pilot groups involved submit whatever differences they could not resolve through negotiation to binding arbitration. . . . As the courts have recognized, ALPA adopted these procedures to insulate itself from the political pressure to favor one of its pilot groups over the other that it would otherwise be under in every merger. . . . In the TWA/Ozark merger, for the only time in its history . . . , ALPA

> arbitrarily discarded its merger policy in response to the demands of the larger, and more politically powerful, pilot group, and allowed that group to control the seniority integration process.

Plaintiffs do not provide a completely accurate description of the situation in which ALPA found itself, or what ALPA did. Arrayed against the Ozark pilots was not just the TWA pilots but TWA as well. This is because TWA management felt a loyalty to the TWA pilots who had made prior contract concessions.

The dispute between the two pilot groups centered on the integration of the seniority lists of the two carriers. It played itself out as a dispute between the two groups over the procedure by which the seniority lists would be integrated. The TWA pilots did not want the ALPA merger policy implemented; Ozark pilots did want it implemented. ALPA attempted to obtain an agreement between the two pilot groups on senority integration. This attempt was unsuccessful and the merger policy was ultimately implemented, too late to be of any use according to plaintiffs. However, ALPA's delay in implementing merger policy can hardly be characterized as arbitrary when the delay was caused by ALPA's attempts to obtain an agreement between the two pilot groups. Plaintiffs' position seems to be that unless ALPA implemented its merger policy immediately it was acting arbitrarily. At the time, it appeared that this could result in layoffs of the Ozark pilots by TWA. Even if plaintiffs are correct and the layoffs would have been illegal, vindication of those rights would have required litigation with perhaps a lengthy period of joblessness for the Ozark pilots. The delay in the implementation of merger policy thus was not arbitrary. In addition, the settlement itself, including the settlement of the integration of the seniority lists, and the decision to

settle were not arbitrary and were approved by the overwhelming majority of the Ozark pilots.

Plaintiffs contend that ALPA's actions were discriminatory in that:

> ALPA's actions in this case were motivated, among other things, by its desire to placate a larger more politically powerful segment of its membership at the expense of a much smaller, weaker group; to advance the political interest of its President, Hank Duffy; and to benefit the existing TWA pilot group at the expense of the Ozark pilots combining with it. . . . It is a breach of the duty of fair representation to discriminate for any of these reasons, whether to placate a more politically powerful segment of the union at the expense of a minority segment, . . . to advance or protect the political interests of a union official, . . . or to favor existing employees over newcomers in a merger of two union groups, ...

Plaintiffs have not presented evidence that ALPA acted for any of the motives attributed to it. It appears rather that ALPA was attempting to obtain the best bargain possible for the minority Ozark pilots in circumstances in which the Ozark pilots were in an incredibly weak bargaining position. And it is the great weakness of the bargaining position of the Ozark pilots, rather than a breach of ALPA's duty of fair representation, that resulted in the settlement to which plaintiffs object. It is interesting as well that, aside from the lack of evidence that ALPA was acting to politically benefit its president, there is in fact some evidence that Mr. Duffy would have been benefited politically by taking the strongest possible pro-Ozark-pilots line. This is because the TWA pilots had threatened to leave ALPA for another union, so a strong pro-Ozark-pilots line would logically have turned Ozark pilots into Duffy supporters and turned TWA pilots into nonmembers of ALPA.

Plaintiffs contend that ALPA's actions were in bad faith in that:

> ALPA demonstrated its bad faith both by discriminating against the Ozark pilots for the impermissible reasons set forth above and by a number of specific acts detailed in plaintiffs' summary judgment papers. One such act is particularly relevant here .... ALPA's recommendation that the Ozark pilots capitulate was based on its lawyer's intentional misrepresentation of facts relating to the meaning of the wraparound agreement, information crucial to the decision confronting the Ozark pilots.

The claim of discrimination has already been disposed of contrary to plaintiffs' position. The many unspecified "specific acts detailed in plaintiffs' summary judgment papers" are difficult to discern, apart from the claims of discrimination. Suffice it to say that the court finds nothing in plaintiffs' brief in opposition to the motions for summary judgment that would constitute bad faith in the context under discussion.

Plaintiffs' contention that ALPA's lawyer intentionally misrepresented facts is nothing short of scurrilous. The wraparound agreement was negotiated by ALPA on behalf of the TWA pilots prior to the merger with Ozark. The use of the word "ALPA" in the wraparound agreement to describe one of the parties to the agreement has given rise to a dispute over whether the wraparound agreement was with ALPA as a whole including the Ozark pilots or with ALPA solely as representative of the TWA pilots. ALPA's lawyer's interpretation of the wraparound agreement to apply only to the TWA pilots was certainly a legitimate one (with which this court agrees) and does not warrant the defamatory statement made in plaintiffs' brief.

Thus, there is no genuine issue of material fact as to whether ALPA's actions were arbitrary, discriminatory, or in bad faith; they were not. Both defendants are therefore entitled to summary judgment on Count I of the second amended complaint.

The second count of the second amended complaint is a claim against both defendants for breach of the contract known as the wraparound agreement. However, the wraparound agreement does not give any rights to the Ozark pilots.

The wraparound was an agreement negotiated by ALPA with TWA and Carl C. Icahn and his affiliates prior to the acquisition of TWA by Mr. Icahn. It was negotiated on behalf of the TWA pilots; not on behalf of all members of ALPA as plaintiffs would have it. This is seen in many provisions of the wraparound agreement which only makes sense if it was negotiated on behalf of the TWA pilots. For example, the first paragraph, which states that "the Amendment of Agreement annexed hereto as Exhibit A constitutes the New CBA." The document referred to is entitled "Letter of Agreement between Trans World Airlines, Inc. and the Air Line Pilots in the service of Trans World Airlines, Inc. as represented by the Air Lines Pilots Association International" (or LOA #19). Later, the wraparound agreement provides that "In accordance with Section 15(c) of the Agreement, ALPA agrees that employees in the bargaining unit represented by ALPA shall not engage in sympathy strikes against TWA or New TWA or refuse in the course of their employment to cross any picket line." Other provisions of the wraparound agreement are consistent with its application only to TWA pilots and not to ALPA members generally.

Moreover, the provisions on which plaintiffs would principally rest their claim to rights under the wraparound agreement are not inconsistent with the wraparound agreement only granting rights to the TWA pilots. In discussing the wraparound agreement, plaintiffs state that:

> Two key rights are relevant here: (1) ALPA's right to prevent an operational merger of TWA and the acquired airline, and (2) ALPA's right to determine the means by which the seniority lists of TWA and the acquired airline will be merged.

It is important to note what exactly that portion of the wraparound agreement provides. The provision at issue states:

> The Icahn Group and ALPA further agree that if TWA, New TWA or the Icahn Group acquires "control" of a company . . . which company owns or operates another airline . . . ; then: (a) for the period through December 31, 1988 . . . (i) the Icahn Group shall cause such airline to be operated as or by a separate wholly-owned subsidiary or separate operating division of TWA or New TWA, (ii) there will be no full or partial merger undertaken of the pilot seniority lists of the airline operated by TWA or New TWA ("TWA Airline") and such other airline ("Acquired Airline") without prior consent of ALPA, (iii) the fleet size of the TWA Airline as it existed immediately prior to such acquisition shall not be reduced by TWA or New TWA except to the extent airplanes can be sold or otherwise disposed of pursuant to Section 7 of the Agreement, (iv) any exchange of airplanes between the TWA Airline and the Acquired Airline shall not be permitted to result in substantial adverse impact on the group of pilots protected under the provisions of Letter of Agreement XIX between ALPA and TWA ("LOA #19") because of changes in the makeup of the TWA Airline fleet, (v) if the annualized level of block hours

> of flying of the TWA Airline is reduced below 469,000 hours as a result of acquiring such other airline and the monthly credit/pay cap for TWA Airline pilots is lowered to 65 hours as provided in LOA #19, there shall be no furlough of Pilots protected under LOA #19 provided, however, that this shall not affect the application of LOA #19 in other circumstances, and (vi) Section 1, paragraph 3 and Section 4(d)(8) of the TWA-ALPA collective bargaining agreement shall not be triggered as a result of such acquisition . . . .

There can be no doubt that these provisions were negotiated on behalf of the TWA pilots in order to protect TWA pilots in the event of a merger; not to protect the pilots of any acquired airline. The Ozark pilots were therefore neither parties to nor third party beneficiaries of the wraparound agreement.

So the wraparound agreement is unambiguous; it gives rights only to TWA pilots. While it is unnecessary at this point to consider it, the court would note that the extrinsic evidence of the understanding of the parties signing the agreement is consistent with this interpretation. The court also notes that the Ozark pilots (a/k/a plaintiff class) overwhelmingly approved the integration of the seniority lists that plaintiffs now seek to have undone.

There is no genuine issue of material fact on the question of whether plaintiffs are entitled to relief from either defendant for a breach of the wraparound agreement; plaintiffs are not entitled to such relief. Defendants are both entitled to summary judgment on Count II of the second amended complaint.

The third count of the second amended complaint is a claim against defendant ALPA for violation of sections 101(a)(1) and 101(a)(2) the LMRDA. 29 USC §§ 411(a)(1), 411(a)(2). Plaintiffs contend that ALPA committed three separate violations of section 101 of the LMRDA.

Plaintiffs contend:

> First, ALPA's refusal to allow the Ozark pilots the right to vote on the TWA-ALPA collective bargaining agreement violated Section 101(a)(1) of the LMRDA. Under Section 101(a)(1), a union cannot unreasonably deny membership the right to vote on a collective bargaining agreement if that right is provided by the union's constitution and by-laws. . . . Section 101(a)(1) mandates that voting rights given to some members must be given to all. . . . As stated in *Bunz v. Moving Picture Machine Operators, Etc.*, 567 F.2d 1117, 1121 (D.C. Cir. 1977), "[a] union's discrimination against its members is most obvious, of course, when it denies some of them the right to vote outright."

At the time the TWA pilots voted on the TWA-ALPA collective bargaining agreement (TWA-ALPA CBA), the Ozark pilots' own representatives (who were other Ozark pilots) on the Ozark MEC were taking the position that the Ozark pilots were covered by the Ozark-ALPA CBA. It is difficult to see how ALPA violated the LMRDA by acceding to the position of the Ozark MEC that the TWA-ALPA CBA did not cover the Ozark pilots. Also, as ALPA points out, the TWA-ALPA CBA would have been ratified even if every Ozark pilot had voted against it. So, even if there had been a violation of the LMRDA by ALPA in not allowing the Ozark pilots to vote on the TWA-ALPA CBA, it would not have made any practical difference in the result.

Plaintiffs also contend:

> ALPA also violated the Ozark pilots' rights under Section 101(a)(1) of the LMRDA by failing to allow them a meaningful vote on the merger agreements. Though the Ozark pilots were given the right to vote, the LMRDA requires that each pilot's vote must be "meaningful." . . . By failing to fully enforce its

> merger policy and its rights under the wraparound agreement, ALPA created a situation in which the Ozark pilots were voting under severe and unlawful duress and coercion, thereby denying them a meaningful vote on the merger documents.

As noted previously, the rights under the wraparound agreement belonged to the TWA pilots, not to the membership of ALPA generally. The failure to fully enforce the merger policy claim is really a claim that ALPA enforced its merger policy later than would have been most helpful to plaintiffs.

As explained earlier, ALPA had good reasons for delaying implementation of its merger policy as it was attempting to resolve the seniority-list-integration issue on a basis acceptable to both pilot groups. The duress and coercion to which plaintiffs refer were TWA's transfer of aircraft from Ozark to TWA, furloughing of some Ozark pilots, and threat to do more if the Ozark pilots did not ratify the seniority list integration and other aspects of the merger. Plaintiffs do not note any particular provision of any agreement giving Ozark pilots rights that would prohibit TWA from transferring aircraft or furloughing pilots. Rough as it may be, the sort of economic pressure applied by TWA is common in labor disputes and is not of itself unlawful. ALPA was willing to back the Ozark pilots if they chose to stand on their presumed rights and not ratify the new agreement TWA was seeking with them; however, the Ozark pilots overwhelmingly ratified that agreement. That overwhelming ratification was not the result of any violation of the Ozark pilots' rights under the LMRDA by ALPA but rather a rational decision that the Ozark pilots were better off ratifying the agreement than they would be taking their chances on an uncertain lawsuit during which many if not all of them might be out of work.

Plaintiffs also contend:

> ALPA's third LMRDA violation occurred when Duffy refused to ballot the Executive Board in violation of ALPA's constitution. By denying the Ozark pilots the right to appeal the Executive Committee's action not to impose ALPA Merger Policy on September 9, 1986, ALPA clearly interfered with the Ozark pilots' right to express their views and arguments to the Executive Board, in violation of section 101(a)(2) of the LMRDA.

The statute upon which this claim is purportedly premised states:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings . . . .

29 USC § 411(a)(2). Duffy's refusal to ballot the Executive Board, if it occurred, would not have denied plaintiffs their right "to meet and assemble freely with other members;" their right "to express any views, arguments, or opinions;" or their right to "to express at meetings of the labor organization . . . [their] views, upon candidates in an election of the labor organization or upon any business properly before the meeting."

There is no genuine issue of material fact as to whether plaintiffs are entitled to relief from ALPA for a violation of the LMRDA. Plaintiffs are not entitled to that relief and defendant ALPA is entitled to summary judgment on Count III of the second amended complaint.

The fourth count of the second amended complaint is a claim against defendant TWA for breach of the Ozark-ALPA CBA. The fifth count of the second amended complaint is a claim against TWA for a change in agreements affecting rates of pay, rules, or working conditions in violation of the RLA. The terms of the Ozark-ALPA CBA and the RLA make it useful to discuss these two counts together.

The RLA provides, *inter alia*:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements *except in the manner prescribed in such agreements* or in section 156 of this title.

45 USCA § 152, Seventh (West 1986) (emphasis added). Thus, if the change in rates of pay, rules, or working conditions were changed in a manner prescribed in the Ozark-ALPA CBA, the RLA was not violated.

The Ozark-ALPA CBA provided, *inter alia*:

> H. The provisions of this Agreement shall be binding upon any successor or merged company or companies, or any successor in the control of the Company, unless and until changed in accordance with the provisions of the Railway Labor Act.

To this point, it appears that (1) the CBA would be applicable to TWA as Ozark's successor and (2) the only way to change provisions of the agreement would be in accordance with the RLA which, for changes in rates of pay, rules, or working conditions, means compliance with section 156 of title 45. However, the next paragraph of the Ozark-ALPA CBA changes things considerably:

> I. Either party may at any time propose in writing to the other party any amendment which either party may desire to make in this Agreement and, if such

> amendment is agreed to by both parties hereto, such amendment shall be stated in writing, signed by both parties, and the amendment shall be deemed to be included in and shall become a part of this Agreement.

There is no indication in the CBA that the amendments contemplated are required to be minor; no indication that there could not even be an amendment of the whole CBA by substitution of a new CBA.

What effectively occurred in the case at bar was that TWA proposed agreements that were amendments of the Ozark-ALPA CBA. The proposed amendments were in writing. The Ozark pilots overwhelmingly ratified the new agreements and, of course, TWA agreed to them. All that was left at this point was for both parties to sign the agreements, which they did.

The overwhelming vote ratifying the agreements is significant, as it shows that a large majority of Ozark pilots preferred the new arrangements with TWA to the alternative. It is also noteworthy that among the agreements executed on February 20, 1987, was one by which all disputes regarding the terms and conditions of employment of the Ozark pilots were resolved. In this case, where there was no breach by ALPA of its duty of fair representation and where there was no coercion or duress that would vitiate the vote of the Ozark pilots, the court believes that the ratification and signature of the agreements waived any rights plaintiffs might otherwise have had under the Ozark-ALPA CBA or the RLA.

There is no genuine issue of material fact as to whether plaintiffs are entitled to relief from TWA for a breach of the Ozark-ALPA CBA or for a violation of the RLA; plaintiffs are entitled to relief for neither of these claims. Defendant TWA is entitled to summary judgment on Counts IV and V of the second amended complaint.

For the foregoing reasons, this court concluded that there was no genuine issue as to any material fact and that defendants TWA and ALPA were entitled to judgment as a matter of law. FRCP 56(c). Therefore, this court granted in their entirety the motions for summary judgment of both defendants and entered judgment in favor of defendants ALPA and TWA and against plaintiffs on all five counts of the second amended complaint.

/s/ GEORGE W. LINDBERG
George W. Lindberg
United States District Judge

Date: SEP 26 1991

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	
TRANS WORLD AIRLINES, INC.,	:	Case No. 92-115
Debtor.	:	Chapter 11
DAVID A. HAMMOND, et al.	:	
Plaintiffs,	:	
v.	:	Motion No. M-92-33
TRANS WORLD AIRLINES, INC. and THE AIR LINE PILOTS ASSOCIATION,	:	
Defendants.	:	

STIPULATED ORDER

David A. Hammond, et al., having moved pursuant to 11 U.S.C. §362(d) for the entry of an order modifying the automatic stay with respect to *Hammond, et al. v. Trans World Airlines, Inc., et al.*, No. 91-2957 (United States Court of Appeals for the Seventh Circuit); and Trans World Airlines, Inc. having stipulated to the entry of the following order:

IT IS ORDERED this 13th day of February, 1992, that:

1. The automatic stay provided by 11 U.S.C. §362 is modified to allow the parties and the Seventh Circuit to proceed with the disposition of appeal No. 91-2957, *Hammond, et al. v. Trans World Airlines, Inc., et al.* including oral argument as scheduled on February 24, 1992, the subsequent issuance of a decision by the Seventh Circuit,

post-decision proceedings, if any, before the Seventh Circuit (such as a Petition for Rehearing or Rehearing en banc), a petition for a writ of certiorari, if any, to the U.S. Supreme Court, and the issuance of the Seventh Circuit's mandate to the District Court. This Order does not modify the stay as to any further proceedings against Trans World Airlines Inc., in the District Court in the event that the Seventh Circuit reverses the District Court decision on appeal in No. 91-2957 and/or remands the case to the District Court. In that situation, all parties reserve their right to seek (or oppose) a further modification of the stay with respect to further proceedings in the District Court.

/s/ HELEN S. BALICK
Helen S. Balick
United States Bankruptcy Judge

STIPULATED TO:

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Air Line Pilots Association

MERGER POLICIES



and Related Employee Protective Provisions

December 1985

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MERGER POLICY BOOKLET
DECEMBER 1, 1985

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MERGER POLICY BOOKLET
DECEMBER 1, 1985

SOURCE—Except where noted otherwise, the Merger Policy was adopted/reaffirmed by the May 1982 Executive Board.

SCOPE AND PURPOSE

The fundamental scope and purpose of this policy is to provide protection for the employment rights of flight deck operating crew members. This policy shall be applicable when it is learned of management's intentions to effect a temporary or permanent alteration of their route structure or operations by a merger, consolidation, unification, purchase, acquisition of control, pooling or any other similar arrangement, in whole or in part, of their separate airline facilities or any of the operations or services previously performed by them through such separate facilities or any alteration by deletion, suspension, sale, transfer, reallocation, farm out, abandonment, dismemberment, modification or substitution of another transportation carrier's service, or the formation of an Alter Ego company which may result in the transfer, displacement or dismissal of a flight deck operating crew member or a dilution or diminution of benefits attaching to his previous employment. Any of the above acts shall hereinafter be termed "merger."

A. *Definitions*

1. For the purposes of this policy the date of MERGER APPROVAL shall mean the date of final approval of the proposed merger by the stockholders of the involved corporations.

2. POLICY INITIATION DATE is the date of merger approval or the date on which the respective MEC Chairman and the President determine that a reasonable probability of a merger being consummated exists, whichever is earlier.

B. *Notice of Merger*

1. Upon learning of an intent to effect changes as outlined in the Scope and Purpose paragraph of this section, or when requested by an MEC Chairman, ALPA shall make reasonable assurances that affected employees will have access to appropriate employee protective provisions which will allow the transfer of employment and seniority from one company to another.

2. When there is mutual agreement between the requesting parties and the President that the above provisions have been met, the President shall convene a meeting between the MEC Chairman and the Merger Representatives of each airline affected under the scope of this policy into joint session and orient the participants on the provisions of this policy.

3. Each MEC shall be required to have two merger representatives at all times. These representatives shall be elected by the MEC from their respective seniority list. Each MEC may, at its option, elect one additional committee member to assist the merger representatives.

4. In the event an MEC fails to elect merger representatives within 30 days following the policy initiation date, the President may, at his discretion and subject to an opportunity for the affected MEC to be heard by him, appoint any member of ALPA in good standing from the affected airline to fill any merger representative vacancy. The MEC or the President, whoever designates these representatives, will certify them as having complete and full authority to act for and in behalf of the flight deck operating crew members of their respective airlines for the purpose of compiling a single flight deck operating crew member seniority list.

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5. The President and ALPA shall take all measures as may be applicable to ensure that the flight oper-

ations, equipment and routes of each company party to a merger shall remain separated until such time as the pilot seniority lists and employment agreements are merged or until the pilot groups affected mutually agree otherwise.

C. *Compilation of Employment Data*

1. Each MEC will compile their airline employment data and update said data annually, so as to be available at all times. Clerical and staff help may be utilized to compile this data where practicable and that such data, once compiled and certified, shall be stored by ALPA for further use as needed.

2. Verification of this employment data will be held in abeyance until it has been determined that a merger is imminent.

3. The merger representatives shall be responsible for determining the employment date, date of birth, seniority number, furlough time and leaves of absence time for each flight deck operating crew member on its current seniority list utilizing Company payroll records and/or other records as necessary. Each furlough and leave of absence, or any intervening periods of service other than as a flight deck operating crew member with this Company shall be listed separately with an explanation covering the period. Furlough time directly related to a labor dispute or work stoppage shall not be included. For the purpose of determining said relationship, the furlough must originate (a) after the beginning, and (b) before the expiration of 30 days following the termination date of said labor dispute or work stoppage, or the back to work agreement related directly thereto. Said exclusion shall not apply to furlough time occurring more than 365 days following the work stoppage. ALPA leaves, military leaves, and sick leaves shall not be included.

4. The employment date shall be the date upon which a person employed by the Company as a pilot began initial operational training required to perform

such duties in airline operations. Pilots who initially function as flight deck operating crew members in positions other than that of a pilot, but whose working agreement allows normal progression in accordance with seniority to pilot status, shall be considered as being employed as a pilot for purposes of this Section. Persons who initially function as flight deck operating crew members, but in a classification which did not allow normal progression to pilot status in accordance with seniority, and who have subsequently gained the right of progression to pilot status by agreement with ALPA, shall acquire an employment date as a pilot as of the date specified by such agreement. Those veteran flight engineers who gained the right of progression to pilot status in accordance with seniority by agreement with ALPA but who, as of November 20, 1970, are prohibited by their Company policy from exercising such rights, shall for the purpose of this policy be regarded as not possessing entitlement to pilot positions. Where initial employment date as a flight deck operating crew member is different from initial employment date as a pilot as defined above, both sets of data, together with explanations, shall be compiled for the purpose of resolving any inconsistencies among the parties to the merger with respect to special rights for such individuals.

5. In cases where one or more parties to the merger has flight deck operating crew members with grandfather or similar special rights by agreement with ALPA that are limited as to job classification or status within the flight deck crew, employment data with respect to said special classification or rights shall also be compiled.

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D. *Seniority List Integration Procedures*

1. Seniority list integration procedures will commence on the POLICY INITIATION DATE.

E. *Verification and Exchange of Employment Data*

1. The merger representatives will commence the verification of employment data no later than the POLICY INITIATION DATE.

2. The merger representatives shall forward the individual employment data as described in Section B via certified mail, addressee only, return receipt Requested, to each flight deck operating crew member within 45 days of the POLICY INITIATION DATE.

3. It is the responsibility of the individual flight deck operating crew member to verify or challenge the findings of the merger representatives within 15 days of receipt and to support his protest, if any, by written statement of fact. In addition, such protesting member may request a hearing before the merger representatives. All such timely requests shall be granted.

4. The merger representatives will receive and evaluate all protests and will adjudge the validity of the claims. Their decision will be final and such decision shall be in writing and shall be forwarded to the flight deck operating crew member making the protest within 15 days following receipt or following completion of the hearing, if any, by the means outlined above.

5. Upon completion of the processes outlined above, the merger representatives shall prepare a certified Flight Deck Operating Crew Member Seniority List which shall reflect the proper relative position of each member thereon. Such list shall contain that data described in Section C. 3.

6. Employment data verified as outlined above shall be exchanged no later than 75 days following the POLICY INITIATION DATE. For purposes of this initial exchange of data, said data need not pertain to events more recent than the date of the first Company notification of intent to merge.

7. Additional data pertinent thereto and pertinent to the solution of integration problems will be made available to all representatives.

F. *Negotiations/Mediation*

1. The merger representatives of the affected airlines shall meet and commence efforts to arrive at a mutually satisfactory method of integration and compilation of a single acceptable flight deck operating crew member seniority list no later than 95 days following the POLICY INITIATION DATE. Similarly, in cases where one or more parties to the merger has flight deck operating crew members with grandfather or similar special seniority rights that are limited as to job classifications or status within the flight deck crew, the merger representatives shall commence efforts to arrive at a mutually satisfactory method of integration and compilation of such separate special seniority lists as may be necessary and appropriate to preserve and protect such rights in addition to the flight deck operating crew member seniority list.

2. Nothing herein shall preclude the assembly of more than one list for each of the above classifications where the transfer of major routes or operating authority will be contingent on proceedings separate from the "instant proceeding" and such known contingencies may warrant the future replacement of one list with another.

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3. The first task of the merger representatives shall be to resolve any and all disputes and inconsistencies with regard to the employment data exchanged. The representatives shall be empowered to compromise their differences to the extent necessary to reach agreement except that the relative position of the flight deck operating crew members on their respective seniority lists shall be maintained. Areas remaining in disagreement shall be reduced to writing,

stating the contentions of the parties and shall be resolved, if necessary, by utilizing the mediation or arbitration procedures which follow.

4. The merger representatives shall carefully weigh the equities inherent in their merger situation. Major windfalls by one group at the expense of any other group shall be avoided. In joint session, the merger representatives shall attempt to match equities to various methods of integration until a fair and equitable agreement is reached. Merger representatives should consider, but are not limited to, any or all of the following factors in determining a solution: Date of hire, length of service, type of equipment, number of pilots on furlough, route structures and any other factors mutually acceptable to the participants. (Board 1982) (Read into the Record: It is the intent of Committee #9 that none of the resolutions contained in Agenda Item #12 shall apply to any merger or acquisition presently announced or in progress.)

5. The merger representatives shall report to the President, upon request, on their progress once negotiations begin. If, at any time after receiving the first report, in the opinion of the President, satisfactory progress is not being made, he may unilaterally intervene and invoke mediation.

6. The purpose of mediation shall be to reach a fair and equitable settlement consistent with ALPA policy, or failing a settlement, to narrow the issues remaining between the parties by encouraging stipulations on issues where there has been substantial agreement.

a. Apart from the stipulations arrived at during Mediation mentioned above, nothing stated by either party in the course of negotiations or mediation shall be disclosed to the Arbitration Board, should arbitration become necessary. The Mediator should treat as confidential all matters discussed.

7. The merger representatives shall be given the opportunity to select a Mediator by mutual agreement. If the parties fail to agree on the choice of a Mediator, the President shall make the selection.

8. The Mediator shall report to the President every five days on the progress being made in mediation and shall recommend that mediation be terminated when, in his opinion, further progress is not possible. After receiving the Mediator's initial report, the President may at his discretion terminate mediation.

9. If, prior to the beginning of Arbitration Board hearings under this policy, additional action projects the interests of another pilot group into the seniority integration problem, said arbitration may be delayed at the discretion of the President. Such delay shall be for the purpose of allowing the additional MECs affected by the action to become parties to the procedures in progress under this policy. In the event such delay is invoked, the President shall set the extent of such delay not to exceed an amount of time equal to the time limits specified in this policy.

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G. *Arbitration*

1. Arbitration shall be mandatory if within 155 days from the POLICY INITIATION DATE (60 days after negotiations/mediations commence) negotiations and mediations have not resulted in an integrated flight deck operating crew member seniority list. Such arbitration, except as specially provided for herein, shall be conducted in accordance with the U.S. Arbitration Act, as amended.

2. The Executive Committee shall select and maintain a current master list comprised of 50 ALPA members who have consented to serve as members of a seniority integration Arbitration Board.

3. The Arbitration Board shall be composed of three persons, two of whom shall be ALPA members chosen

from the Master List of Pilot Neutrals. The third member of the Board shall be chosen from a list of Arbitrators approved by ALPA. All members shall be selected within 160 days following the POLICY INITIATION DATE (65 days following commencement of negotiations/mediation).

4. If the merger representatives are unable to agree on the composition of said Board, they will elect these members by alternately striking a name from the respective lists until the required number of persons remain. In the event a selected Board member is unable to serve, the President shall retrace the striking procedure in reverse order until all Board vacancies have been filled by those willing and able to serve.

5. The Arbitration Board shall convene at the Home Office or other location approved by the President no later than 185 days following POLICY INITIATION DATE (90 days following negotiations/mediation). The President may, however, at his discretion, extend this time limit an additional 15 days. It shall be the duty of the Arbitration Board to merge the flight deck operating crew members in a fair and equitable manner consistent with ALPA policy.

6. The Board may hold prehearing conferences at its discretion to receive stipulations, and establish rules of procedure and time limits.

7. The Opinion and Award of the Arbitration Board shall be made and written in executive session and shall bear the signature of those who concur and dissent. Such Opinion and Award shall be issued simultaneously and within 260 days following POLICY INITIATION DATE (60 days following the convening of said Board) unless extensions are agreed to by all parties to the proceeding. Participation in executive sessions shall be by Board members only and a majority vote will decide all issues.

8. The Award of the Arbitration Board shall be final and binding on all parties to the arbitration and shall be defended by ALPA. The Board will include in its Award a provision retaining jurisdiction until all the provisions of the Award have been satisfied for the limited purpose of resolving disputes which may arise between the pilot groups with regard to the meaning or interpretation of the Award.

9. The Merger representatives of the affected airlines shall be charged with the preparation of their contentions regarding the merger and their subsequent presentation before the Arbitration Board. Such contentions may be made orally or may be made in writing as the representatives shall deem advisable.

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H. *Merger General*

1. No inference should be drawn from anything contained in this policy that any one method of integrating the seniority lists is preferable to any other method except that no integrated list shall be constructed which would change the order of the flight deck operating crew members on their own respective seniority lists.

2. The time table outlined in this policy shall be complied with except that the President and the MEC Chairman of the participating parties may by a majority vote grant such extensions deemed appropriate.

3. When any given deadline is extended in this manner, each subsequent deadline will automatically be extended by the same number of days.

I. *Implementation of the Merged Flight Deck Crew Member Seniority List*

1. The merger representatives shall remain in office, in the case of a negotiated or mediated agreement, until the provisions of that agreement have been satisfied or in the case of arbitration until the arbitration board relinquishes jurisdiction.

2. Should a merger representative become unable or unwilling to continue in office, once the merged MEC officers have been elected, the remaining merger representative will select his replacement from his respective pilot group. Such replacement shall have all the duties, responsibilities and authority as his predecessor.

NOTE: Nothing herein is intended to limit the discretion of respective MECs in the selection of its merger representatives prior to the election of merged MEC officers.

3. The merger representatives shall be empowered to resolve any and all disputes arising from the interpretations or implementation of either a negotiated/mediated or arbitrated merger agreement. The disputes shall be resolved by a majority vote of the merger representatives, except, where a pilot's actual position on the seniority list is concerned; in which case a unanimous vote shall be required. All decisions reached by the merger representatives shall be final and binding and not subject to appeal.

4. When disputes arising under negotiated or mediated agreement cannot be resolved by the merger representatives, the President shall, within 30 days of notification the existence of a dispute, petition the National Mediation Board to supply a list of arbitrators from which the respective pilot groups (merger representatives) may select a mutually agreeable arbitrator. Should an arbitrator not be mutually agreed upon, one will be selected by the alternate striking method.

5. When disputes arising under an arbitrated award cannot be resolved by the merger representatives such disputes shall be remanded to the arbitration board for resolution.

J. *Expenses and Flight Pay Loss Authorized in Merger Cases*

1. Flight pay loss, expenses and direct support are chargeable to the MEC Account.

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K. *Payment of Legal Fees in Merger Cases*

1. ALPA shall not, under any circumstances, pay any of the legal fees incurred by pilot groups in merger cases. This policy was established on the basis that ALPA should not subsidize legal battles between ALPA members.

2. This policy also applies to arbitrations conducted to resolve a dispute between pilot groups over interpretation or applications of the terms of an existing seniority merger agreement.

L. *Return of Unused Merger Assessment Funds*
SOURCE—Board 1984

1. Funds derived from an assessment imposed by a Master Executive Council to finance the legal and related costs incurred in negotiating or arbitrating a merged seniority list must be recorded in a manner showing the amount paid by each pilot. This fund shall be known as the Merger Assessment Fund.

2. An audit of each Merger Assessment Fund shall be conducted within 60 working days after the signing of the merged working agreement. This audit is to be conducted by the Office of the Treasurer.

3. Monies remaining in the Merger Assessment Fund shall be transferred within 10 working days of the completion of the audit, to the custody of the Treasurer, and thereafter shall be known as the Merger Dispute Fund.

4. Each pre-merger Master Executive Council shall elect two Merger Dispute Fund trustees who will authorize expenditures from that Fund. It is recom-

mended that the trustees be someone other than the Merger Representatives. Should a trustee, once elected, become unable or unwilling to continue in that position, once the merged MEC officers have been elected, the remaining trustee will select a replacement from his respective pilot group.

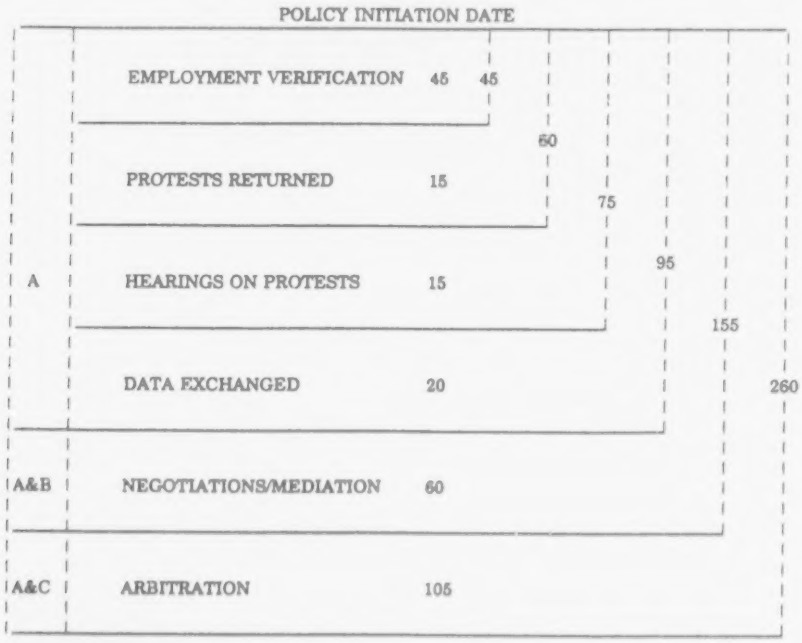
Should both trustees, once elected, become unable or unwilling to continue in that position, once the merged Master Executive Council officers have been elected, the Merger Representatives will select two replacements from their respective pilot group.

5. The Treasurer will maintain custody of the Merger Dispute Funds for the effective period of interim restrictions contained in the merged seniority list or until the Arbitration Board relinquishes jurisdiction, whichever shall occur later, but in any case not to exceed five years from the Policy Initiation Date. No further expenses shall be chargeable to such funds upon the termination of the interim restrictions or the date the Arbitration Board relinquishes jurisdiction, whichever is later, but in any case no later than five years from the Policy Initiation Date, and within six months of that date, the balance of such funds shall be returned, on a pro rata basis.

Any policy changes and recommendations shall apply only to those mergers whose POLICY INITIATION DATE occurs subsequent to the adjournment of the 1984 Board of Directors meeting.

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M. *Merger Policy Time Table*



A = Merger Representatives
B = Mediator
C = Arbitration

N. *Multiple Autonomous Operations*

1. It is the intent of this policy that in every case the process will commence when the conditions described in Section 1.A.2. are met and will continue until an integrated seniority list is achieved.

2. In merger cases where the carriers continue to operate as completely separate and independent entities, and where the employment rights of each pilot group are clearly distinguishable from those of the other pilot group or groups and where there is reasonable certainty that the employment rights of one or more pilot group or groups are not jeopardized by doing so, the President may, with the unanimous

consent of the MEC chairmen involved, temporarily suspend the process beyond this point.

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3. In the event any MEC chairman or the President determines that the carriers are not in fact being operated as absolutely autonomous, and separate entities and that as a consequence the employment rights of one or more pilot group or groups may be adversely impacted, the President will reinstitute the merger policy in order to negotiate a merged working agreement and to implement the merged seniority list.

4. ALPA will use all means at its disposal to compel the company to recognize the merged seniority list, including, but not limited to, litigation at all appropriate levels.

O. *Merging of Employment Agreements*

1. Consistent with the implementation of merger procedures contained herein, each of the affected Master Executive Councils shall appoint two Negotiating Committee members for the purpose of jointly obtaining interim safeguards and merging the employment agreements. The Master Chairmen of the respective airlines shall be ex-officio members of such committee. The President shall closely monitor the preparation of the opening letter and all attendant problem areas and shall, if necessary, appoint a Chairman of the Joint Negotiating Committee.

2. In the event contractual issues remain unresolved within 30 days following receipt by ALPA of the merged seniority list, the President will call a meeting of the Joint Negotiating Committee to resolve these issues. In no event, except by mutual agreement of all parties, will the company be given the right to use the merged seniority list prior to the successful conclusion of the merged working agreement.

3. ALPA shall seek to incorporate into all employment agreements the strongest and most effective protection possible covering mergers, route transfers, abandonment, dismemberment, alter ego airline, etc. Such protection may include, but not be limited to, scope clauses. Section 6 openers under the Railway Labor Act, contractual successor and survival provisions and labor protective provisions.

P. *Council Representation Elections in Mergers*

1. When a duplication of Local Councils exists at a domicile as the result of a merger, the Secretary shall conduct Council Officer elections for the combined Local Council within 30 days after the signing of the merged working agreement, said elections to be conducted as provided in Article III, Sections 7 and 8, of the Constitution and By-Laws, except as provided below. Pending completion of said election, the Secretary shall call a meeting of the joint Local Councils at a time and place he establishes for the purpose of electing Interim Status Representatives and Temporary Council Officers. The Secretary, or his designee, shall chair such joint session until such time that a Temporary Chairman has been elected. When nominating ballots are distributed, members of both Councils will be advised of their right to nominate from among the pilots of the involved Councils and all nominating ballots shall be returned to the Secretary at the Home Office. He will arrange for their security and will arrange for their being brought to the joint Local Council meeting for certification. At this meeting Interim Status Representatives will be elected. The successful nominees will be certified at such meeting for placement on an election ballot for distribution to all members of the involved Local Councils under the provisions of Article III, Section 8.

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2. Within 45 days following the completion of the joint employment agreement, the President shall call

an MEC meeting for the purpose of electing MEC officers. The President, or his designee, shall conduct such meeting and election. Notwithstanding this requirement, Master Executive Councils of merging airlines may, by agreement, meet for the purpose of electing new MEC Officers prior to the consolidation of Local Councils herein before provided.

Q. *Work Stoppage in Merger Cases*

1. ALPA is directed and all of the members hereby bind themselves to use maximum pressure, including work stoppage, to achieve necessary protection for all flight deck operating crew members involved.

R. *Home Office Retention of Merger Records*

1. At the conclusion of a merger or proposed merger, all factual material related thereto which was gathered under ALPA policy and at ALPA expense will be turned over to the Home Office for filing.

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A. *Seniority—System vs. Industry-Wide*
SOURCE—Executive Board 1949

Since all working agreements have seniority sections where a definite seniority policy is outlined, and since it is felt that these sections properly written can best control this phase of the airline flying profession, and since the concept of system seniority is believed to be the most desirable method of delineating pilot relationships, the Home Office shall endeavor to follow this concept in writing or rewriting all contract seniority sections.

B. *Seniority—General*
SOURCE—Board 1956; Amended Executive Board December 1971

1. Seniority of a pilot shall be based upon the length of service as a pilot with the Company.

2. Seniority shall begin to accrue from the date upon which a pilot employed by the Company as a pilot

begins initial operational training required to perform such duties in airline operations and shall continue to accrue during such period of employment except as otherwise provided in his agreement. On . . . date of this contract . . . , and henceforth, the date upon which a pilot first appears upon the Company's payroll as a pilot and begins initial operational training required to perform such duties in airline operations, shall establish such pilot's position on the System Seniority List. When two or more pilots are placed on the Seniority List on the same date, they shall be placed on such list according to their age, i.e., the oldest pilot shall receive the lowest number.

3. Seniority shall govern all pilots in case of promotion and demotion, their retention in case of reduction in force, their assignment or reassignment due to expansion or reduction in schedules, their reemployment after release due to reduction in force, and their choice of vacancies, provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned. In the event that a pilot is considered by the Company not to be sufficiently qualified, the Company shall immediately furnish such pilot written reasons therefor. This section shall apply except as otherwise stipulated in this Agreement.

C. *Standardization of Seniority Sections*
SOURCE—Board 1956

1. The Home Office is instructed to use every means at its command in standardizing for prospective application two sections of all pilot working agreements.

a. Specifically, the part of the Seniority General Section which establishes hiring procedures and establishment of position on the seniority list, should be standardized so that in the event of mergers, acquisitions, sales, etc., a common foundation will exist, thereby eliminating future controversy on this subject.

b. Specifically, the section in all pilot working agreements pertaining to sales, mergers, acquisitions, etc.,

should be standardized and encompass adequate legal force and effect consistent with appropriate public law.

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D. *Seniority Status of Executive or Engineering Pilots*
SOURCE—Board 1962

1. A regular airline pilot who is offered and accepts an executive or engineering test pilot position may remain on the seniority list in his respective position. Further, strong effort shall be made to negotiate provisions into all working agreements which will require that no aircraft of a Company may be flown on any type of flight by other than pilots who are on the pilots' seniority list and that pilots who would have been furloughed in reverse order of seniority may not fly any type of flight in Company aircraft.

E. *Seniority or Longevity Credit While on Leave of Absence*
SOURCE—Board 1954

Every effort shall be made to incorporate provisions in employment agreements which would allow pilots to secure seniority and longevity credit while performing ALPA duties, providing that during such period the member maintains his certificate or certificates required for his status.

F. *Seniority Accrual of Line Pilot in Military Service*
SOURCE—Board 1948

1. A member who is furloughed by an airline shall be considered as having a permanent position with his Company so that his rights under this law are protected, but his relative position on his company's seniority list shall in no case advance because of having been on active duty. The seniority rights of a member while on active duty with the Armed Forces during a state of threatened war, not a state of national emergency, shall be protected only so long as he is unable to obtain a release from active duty and

that proof of any efforts to obtain his release must be submitted to his local ALPA Council.

2. A member of the Reserves of the Armed Forces who returns to active duty shall file a written request for a military leave of absence with his Company, with a copy to the Home Office, to show his intent to return to his former position. No member on any airline who accepts a permanent commission in the Armed Forces shall be kept on a Company's seniority list.

3. The Employment Agreement Department shall process these recommendations, wherein possible, under existing contracts, or add them to new contracts, and that it be mandatory that the Home Office reaffirm or add all these recommendations to all new contracts. Nothing in this policy shall be construed to attempt to limit the rights and privileges of the member in service under the law.

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A. *Carrier Fragmentation*
SOURCE—Executive Board December 1971

1. The following procedural and policy programs shall govern in cases of sales, transfers, purchase, acquisitions, re-allocations, farm outs, abandonments, dismemberment or other similar fragmentation of existing operations or route systems or portions thereof, whether permanent or temporary.

2. Immediately following activation of this policy, ALPA shall take all appropriate actions necessary to protect the affected pilots including a request for adequate labor protective provisions from the appropriate government agency, the timely enforcement of all contractual provisions in existence, and also assist the affected MECs in opening and processing negotiations with their managements in accordance with Section 6 of the Railway Labor Act. The objective of these actions shall be to produce the desired crew member

protection and to maintain a status quo situation until appropriate agreement can be reached with the carrier managements. ALPA must take all steps to establish:

a. The right of an appropriate number of pilots from the donor carrier to become employees of the carrier acquiring the operations or route.

b. The right of a pilot to protection from loss of income as a result of downgrading or furlough in the event he does not transfer to the carrier acquiring the operations or route but continues employment with his airline.

3. Questions of number, eligibility, seniority equities and methods of selection of the flight deck operating crew members involved in said move shall, unless otherwise established by the appropriate government agency or collective bargaining agreement, be resolved in accordance with appropriate provisions of the Merger Policy and Procedures, i.e., Negotiations, Mediation and Arbitration.

4. Pilots accomplishing the move from one carrier to another will become employees of the acquiring carrier and be covered by the acquiring carrier's agreement.

5. Appropriate provision shall be made in behalf of pilots electing to exercise their transfer option so as to protect and preserve their rights under the retirement plans and their longevity privileges such as vacations, pass privileges, pay computations, sick leave, etc.

6. Appropriate provision shall be made in case the specified route transfer is approved on a temporary basis and subsequently reverts to the donor carrier so as to require all pilots who followed the routes to return to the employment of their former carrier and said carrier be required to reemploy them with all rights, including seniority, restored.

B. *Alter Ego Policy*
SOURCE—Board 1980

1. When the management or stockholders of one airline company form another company for the purpose of creating a separate airline entity, it shall be called an Alter Ego company for the purposes of this section.

2. ALPA will oppose the formation of Alter Ego airline companies and will initiate litigation at every appropriate level to either block their formation or, in the alternative, establish for collective bargaining purposes that the Alter Ego company and the original company are one and the same.

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C. *Interchange Policy*
SOURCE—Board by Mail Ballot April 1955;
Amended—Executive Board December 1971;
Executive Board May 1982

1. ALPA shall neither oppose nor encourage interchange agreements. Interchange as used herein shall mean the interchange of equipment only, e.g., operation of the equipment of one airline by the crews of a second airline over the routes of the second airline.

2. When an interchange agreement is proposed, ALPA shall intervene to secure protection of working agreements pursuant to Section 6 of the Railway Labor Act.

3. When an interchange agreement has been approved, neither ALPA group shall activate its segment of the interchange until it has concluded an agreement with its airline. Such agreement shall include, where applicable, and available through negotiations, the following provisions:

a. That an agreement involving interchange of equipment only does not normally contemplate or require the crews of one airline to fly over the routes of another airline.

b. That when crews of one airline overfly the routes of another airline, because of weather or other reasons, the crews of the other airline are paid and credited as if they had actually performed the flying over the routes of their airline.

c. That when crews of one airline overfly the routes of another airline, they shall be furnished transportation back to the interchange point of their pilot domicile.

d. That crews who are required to deadhead over the routes of another airline shall receive full pay and credit for such deadhead time.

e. That training pay and expenses for qualifying on another airline's equipment, while attending a transition school of another airline, shall be paid.

f. That crew member qualifications and proficiency checks on other than company aircraft shall be performed under the supervision of the Company by whom such member is employed.

g. That a guarantee be provided based on the best paying equipment used on the interchange, or on the lowest paying equipment flown out of the domicile which operates the interchange, which guarantee may be coupled with a freeze in equipment for a specified time, if necessary.

h. That crew members who lose qualifications while frozen on the interchange pursuant to (g) above shall not be financially injured thereby.

i. That all airplanes operated in the interchange shall be essentially similar with respect to flight instruments and their arrangement and with respect to the arrangement and motion of controls critical to safety.

j. That there shall be an effective method of keeping the crew members informed of the latest equipment and operational changes applicable to the interchange.

k. That there be included procedures whereby the crew members can effectively protest to management any inadequacies in the equipment interchange.

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l. That the FAR (Part 121,569) pertaining to equipment interchange, domestic and flag air carriers, be included as required to insure safe operation.

m. That an early reopening date to the agreement be provided so that the operation can be reviewed and the contract renegotiated if parts of it are found to be unsatisfactory.

n. That the crew member not be expected to fly the interchange during a work stoppage by the members on the other airline.

D. *Trackage Policy*
SOURCE—Board April 1955;
Amended—Executive Board December 1971

1. ALPA shall discourage trackage agreements through ALPA intervention. Trackage as used herein shall mean the interchange of equipment and crews, e.g., operation of the equipment on one airline by the crews of that airline over the routes of a second airline.

2. When a trackage agreement is proposed, ALPA shall intervene to protest the approval of such agreement, and in the event that it is approved over the protest, shall secure protection of working agreements pursuant to Section 6 of the Railway Labor Act.

3. When a trackage agreement has been approved, no ALPA group shall activate the agreement until each group affected has concluded an agreement with its respective airline and with the other ALPA group or groups involved. Such agreements with the companies shall include all of the provisions suggested above for interchanges where applicable and available, and in addition should provide:

a. That each ALPA group shall generate the same amount of flight time credit over the other group's route. The crew members of airline A shall fly so as to generate the same number of hours flight time credit over the routes of B airline as the crew members of B fly over A. Pay rates will be based on the equipment used in the trackage.

b. That in the event of inequality in the above hours of flight time credit, the crew members who have flown the fewer hours should be credited for pay and flight time limitation purposes for the excess hours flown by the other airline over their routes.

4. The agreement between ALPA groups should include provisions which:

a. Define the duration of the agreement to provide opportunities for periodic review and renewal.

b. Provide a method of adjusting inequities that may arise.

c. Assure that no group will engage in the trackage operation until all groups have satisfactory agreements with their companies covering the trackage.

d. Assure that no group will fly under the trackage agreement when any other group involved is engaged in a work stoppage.

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A. *ALPA Merger Policy Implementation*
SOURCE—Executive Board May 1982

ALPA Merger Policy when initiated shall govern the actions of the affected pilot groups.

B. *Scope—Employment Agreements*
SOURCE—Executive Board May 1982

It shall be ALPA policy that as each pilot group's employment agreement becomes amendable, every effort shall be made to incorporate provisions which provide for a standard ALPA scope clause.

C. *Labor Protective Provisions*
SOURCE—Executive Board May 1982

It shall be ALPA policy that as each pilot group's employment agreement becomes amendable, every effort shall be made to incorporate provisions which provide for standard ALPA Labor Protective Provisions.

D. *Compilation of Employment Data—Flight Pay Loss and Expenses*
SOURCE—Executive Board May 1982

It shall be ALPA policy that individual pilot groups will attempt to negotiate those expenses and flight pay loss incurred during the compilation of required employment data.

E. *Policy Compliance*
SOURCE—Executive Board December 1971

Any attempt by a member or members of ALPA to obtain an agreement which would operate to frustrate the objectives of this policy shall be considered an act contrary to the best interests of ALPA and its members.

F. *Reaffirmation of Policy*
SOURCE—Board 1982

The Board of Directors reaffirmed its total commitment in the pursuit of legislation, particularly in the area of Labor Protection Provisions, which will ensure pilots' employment rights, and its total commitment to the ALPA Merger Policy as amended by the Board and, therefore, the inherent protection of pilots' employment rights.

G. *MEC Involvement in Neutral Pilot Panel Nominations*
SOURCE—Executive Committee November 1961

The Master Executive Councils shall be contacted with regard to submitting suggestions of pilots on their airline for service on the Neutral Pilot Panel.

H. *Neutral Pilot Panel Updating*
SOURCE—Executive Committee June 1961;
Amended—Executive Committee July 1984

On or about January 1 each year, the Secretary shall cause to be sent to each member of ALPA's 50 member Neutral Pilot Panel an inquiry as to their current willingness and/or ability to serve as a pilot neutral should they be selected for such service by merger representatives involved in a merger dispute. At the same time, the Secretary shall forward a list of the current Neutral Pilot Panel members, as well as the roster of currently approved nominees for Panel service, to all MEC Chairmen seeking their revalidation of current Panel members and nominees

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and soliciting new nominees for Panel service. A report shall be made at a regular meeting of the Executive Committee following such mailing outlining the results of the inquiries and such Panel and nominees roster brought up to date and any necessary appointments made at such annual review meeting. Absent any response, current members and nominees shall be considered revalidated.

Guidelines for Availability and Dissemination of Merger Data

The following administrative and staff guidelines, which are *not* official ALPA policy, have been developed by the General Manager under the authority of the President, as a guidance for Staff Employees when dealing with requests for Merger Data.

1. *Data Categories*—Data and information which ALPA can provide to pilot representatives when their airline is involved in a merger situation fall into far four categories. Some of such data is subject to the availability of necessary staff and computer time:

a. *General Report Data*—Generally, this is data and reports already produced and disseminated within ALPA. Included in this type of information are the Negotiators Summary of Pilot Agreements and the Negotiators Fact Book of Economic and Financial Statistics, Research reports, published white papers, contract status reports, CPI data, Strike Information, Contractual Rates of Pay, Retirement and Insurance Summary of Benefits. Upon request by an MEC Chairman or his designee, ALPA will make this information available at no cost to authorized representatives of the pilot groups involved.

b. *Exchange Data*—This is usually proprietary ALPA information relating to those pilot groups involved in a merger situation. Included in this category would be pilot income rosters, Age-Wage Analysis, Pension performance reports, seniority lists, and flight seniority projection. Written approval *by each MEC Chairman* whose airline is involved in the merger is required before any of this data can be produced and/or disseminated. Authorized representatives of all pilot groups involved will automatically receive a full set of any such data produced or disseminated. It is further understood that any unusual computer costs associated with the generation of this data will be borne equally by the MECs involved through their MEC assessment funds or other non-ALPA sources.

c. •*Shared Data When Mutually Requested*—This concerns information jointly requested on behalf of the pilot groups involved in a merger. Upon written request from the involved MEC Chairmen, or their designees, the information requested, if available, will be produced and distributed to the designated parties. Any computer costs or external costs generated by such requests will be borne equally by the MECs involved through their MEC assessment funds or other non-ALPA sources. Such costs, for example, are not to be charged against the National Account.

d. •*Shared Data When NOT Mutually Requested*—This concerns information, including that from public sources, such as CAB data, requested on behalf of one public group but not desired by the other pilot group(s) involved in a merger. Such data will be furnished subject to adequate staff availability to meet the request without interfering with normal support functions. When furnished, the data will be provided to the authorized representatives of all groups involved in a merger, but the pilot group requesting it will bear the costs of developing and disseminating such data through its merger assessment fund or other non-ALPA source.

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2. *Exclusive Use Data*—This concerns information requested on behalf of one pilot group involved in a merger for its own exclusive use. Requests for such data will not be honored by ALPA. To furnish information to only one party would be contrary to ALPA's obligation to provide fair and equitable services to all pilot groups involved in a merger.

(•) Data requests which do not fall in the category of "General Report Data" or "Exchange Data," and which may be supplied by ALPA, are categorized as "Shared Data." This category recognizes that external sources for information exist and can be utilized and paid for with non-ALPA merger assessment funds by pilot groups wishing to obtain information on an exclusive/confidential basis. This "Shared Data" category also recognizes that:

a) ALPA should not be the source of information which might provide an advantage to one pilot group over another, due to the disadvantaged pilot group not knowing of the existence of the data in question.

b) If information is to be provided on a confidential basis, staff personnel cannot adequately provide staff support to involve pilot groups without creating a conflict of interest.

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BAKER	RICHARD	D.
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BARICH	ROBERT	S.
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Last Name	1st NAME	INIT
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ADKINS*	JAMES	C.
ALEXANDER	CHRIS	A.
ALEXANDER	GEORGE	T.
ALLYN	CLAIR	W.
ALVAREZ	PEDRO	L.
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AMEEL	MARK	A.
ANDERSON	HAL	B.
ANDERSON	JAMES	T.
ANDERSON	MAYNARD	H.
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ARTHUR	JOHN	M.
ATKINS	TERRY	D.
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BROEDER	OTTO	P.
BRUCE	THOMAS	W.
BUERCKHOLTZ	EDWARD	A.
BUNTZ	JEFFREY	W.
BURGESS	DONALD	R.
BURKE	WILLIAM	D.
BURKETT	MELVIN	G.
BURNS	JOHN	M.
BURTON	RICHARD	F.
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BYNUM	JOSEPH	C.
BYRNES	JOHN	J.
CALLAGHAN	MICHAEL	D.

Last Name	1st NAME	INIT
BILLER	RONALD	T.
BISH	HAROLD	
BLACK	JENNIFER	J.
BLACK	PHILIP	L.
BLACKWOOD	TERRY	W.
BLOEMER	VICTOR	G.
BLOSSER	PETER	R.
BOLLMAN	JON	C.
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BORING	MICHAEL	G.
BOZICH	MICHAEL	S.
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BRANDOM	KENNETH	W.
BRATTLOF	MERRILL	
BRICKEY III	THOMAS	C.

Last Name	1st NAME	INIT
BEAUBIEN	GORDON	E.
BEDOWS	ROBERT	L.
BEHLE	LARRY	K.
BEHNKEN	LARRY	D.
BELL	RICHARD	A.
BELSHER	ROBERT	
BELSHER	JOSEPH	R.
BENES	DAVID	M.
BENNETT	LAWRENCE	B.
BENSON	GARY	
BENTON	ROBERT	C.
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BETTIS	GREGORY	S.
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BIAS	JAMES	H.
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DELAFOSSE	JOHN	R.
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DOBBS	BRUCE	B.
DOBSON	DEAN	W.
DODD	JAMES	D.
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DAVIS	CHARLES	J.
DAVIS	DANIEL	R.
DAVIS	JACK	B.
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DEE	EDWARD	F
DEE	STEPHEN	W.

Last Name	1st NAME	INIT
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JOHNSON	JACK	L.
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LANE	GARY	D.
LANSFORD	GARY	L.
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NIELSEN	SCOTT	A.
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NOVAKOVICH	STEPHEN	
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MIZE	JAMES	T.
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MONTGOMERY	RICHARD	B.
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MOORE	FREDERICK	A.
MOORE	PHILLIP	R.
MOORMAN	WILLIAM	
MORRIS	JAMES	H.
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MORRIS	L.	C.

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MCALISTER	WILLIAM	H.
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MCCOOL	PAUL	A.
MCCOSKER	WAYNE	H.
MCCUE	PETER	W.
MCDONALD	GARY	L.
MCELROY	LAWRENCE	R.
MCKENZIE	BILL	W.
MCLARTY	ANTHONY	W.
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REES	ERNEST	C.
REINERT	MARK	J.
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Last Name	1st NAME	INI
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OPP	JAMES	S.
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SMITH	JERRY	L.
SMITH	LEN	G.
SMITH	ROBERT	C.
SMITH III	HY	M.
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SPIROS	THOMAS	A.

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SCHUMAN	JAMES	B.
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SCOTT*	TOM	G.
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SHAVER	DON	F.
SHAW	CRAIG	C.
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SILSBY	JAMES	E.

Last Name	1st NAME
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RUDER	GARY
RUFFNER	JAMES
RUTH	MARK
RZESZOTKO	JOHN
SALLANDER	THOMAS
SALVATORE	ANTHONY
SAMPSON	ROBERT
SANDER	MITCHELL
SANDERS	CURTIS
SANTORO	PHILIP
SCHARP	ROBERT
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VOLLINTINE	DONALD	G.
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WALLACE	DAVID	R.
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TATE	DONALD	E.
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THOMPSON	GARY	L.
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Last Name	1st NAME	INIT
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STANDISH	WILLIAM	C.
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STEWART	DENNIS	
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YAISER	JAMES	F.
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YORK	LIONEL	E.
YORK	HARRY	W.
ZABOJI	GEORGE	
ZACHARIAS	ROBERT	P.
ZALESKI	ROBERT	P.
ZYGMUND	MARTIN	L.

Last Name	1st NAME	INI
WHITE	REXFORD	D.
WHITE	TERRY	F.
WHITLOW	MARK	D.
WHITNEY	JEFFREY	L.
WHITNEY	JOHN	T.
WIENEKE	HAROLD	M.
WILDHABER	CORNELIUS	
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WILLIAMS	MICHAEL	D.
WILLIAMS	MICHAEL	D.
WILLIAMS	ROBERT	R.
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Last Name	1st NAME	INIT
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WARREN	LARRY	R.
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WHITE	JAMES	V.

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No. 93-30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DAVID A. HAMMOND, et al., on his own behalf and on behalf of all individuals similarly situated,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and TRANS WORLD AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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No. 93-30

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v.

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BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners are a group of airline pilots who are unhappy with several collective bargaining agreements which their union leadership negotiated and which they ratified by a 96% vote. After ratification, they filed suit against their union and their employer, claiming that the union breached its duty of fair representation in the negotiations and that the employer violated a contract and the Railway Labor Act by applying economic pressure during collective bargaining.

The Court of Appeals concluded that Petitioners were bound by the negotiated and ratified agreements and that the economic pressure which was applied was a normal part of collective bargaining. Those holdings are consistent with well-established principles of labor law and decisions by other courts of appeals. Indeed, Petitioners cite no decision rendered by this Court or by another court of appeals with which the Seventh Circuit decision conflicts. Accordingly, the petition presents no issue requiring review by this Court and should be denied.

COUNTER-STATEMENT OF THE CASE

In early 1986, Respondent Trans World Airlines, Inc. ("TWA") announced that it would acquire Ozark Airlines, Inc. ("Ozark"). After the announcement, the pilots employed by Ozark and TWA, through their duly elected collective bargaining representatives, engaged in negotiations with each other regarding an integrated pilot seniority list.[1] As is frequently the case in such negotiations, the interests of the bargaining parties differed markedly (App. 43).[2] The TWA pilots sought an integration solely by the pilots' dates-of-hire because such an integration maximized the seniority position of the generally more senior TWA pilot workforce. The Ozark pilots objected to a pure date-of-hire integration because they were on average a more

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[1] Both pilot groups were represented by Respondent Air Line Pilots Association ("ALPA"). However, each pilot group was represented separately through an ALPA Master Executive Council ("MEC"), elected by that airline's pilot group. Thus, the TWA pilots were represented by the TWA MEC and the Ozark pilots were represented by the Ozark MEC.

[2] References to Petitioners' Appendix will be designated as "(App. ____)."

junior workforce and a date-of-hire integration would place many of them at the lower end of the seniority list. Consequently, the Ozark pilots proposed a combined date-of-hire and ratio type of integration (*i.e.*, an Ozark pilot would be slotted after a certain number of TWA pilots, regardless of date-of-hire), the method of integration which they believed would enhance the seniority position of the Ozark pilots.

One issue affecting the pilots' negotiations throughout the summer and fall of 1986 was the applicability of ALPA Merger Policy to the Ozark-TWA merger (App. 43).[3] In August, 1985 and January, 1986, before TWA acquired Ozark, the TWA pilots had entered into agreements with financier Carl Icahn and TWA to induce Icahn to acquire TWA. At the time, the TWA pilots wanted Icahn to acquire TWA to thwart Frank Lorenzo's attempt to acquire the airline. In these agreements, the TWA pilots had granted substantial wage and benefit concessions to Icahn and TWA. In exchange for those concessions, Icahn and TWA had agreed to provide the TWA pilots with certain

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[3] Under ALPA Merger Policy (App. 57-89), an arbitrator decides the method of proposed integration if the pilot groups are unable to reach an agreement. However, two important points are overlooked by Petitioners in connection with their situation in 1986. *First*, even if their disagreement with the TWA pilots was submitted to arbitration, an arbitrator could have adopted the TWA pilots' proposed integration. Thus, application of ALPA Merger Policy would not have guaranteed a better result for the Ozark pilots than the result ultimately obtained through negotiations. *Second*, whatever integration the arbitrator might have rendered was not binding on TWA, which would not be a party to this intra-union proceeding. Instead, the arbitrator's proposed integration would have had to be submitted to TWA for its acceptance. Thus, even if ALPA Merger Policy produced an integrated list through arbitration, TWA was free to reject it (App. 17) (in the words of the Court of Appeals, "ALPA's 'merger policy' could not compel TWA to agree to anything.").

rights in the event that TWA acquired or was acquired by another carrier in the future. Specifically, section 10 of one agreement (referred to as the "Wraparound Agreement") provided:

> The Icahn Group and ALPA further agree that if TWA, New TWA or the Icahn Group acquires "control" of a company . . . which company owns or operates another airline . . . , then:
>
> (a) for the period through December 31, 1988 . . .
>
> (i) the Icahn Group shall cause such airline to be operated as or by a separate wholly-owned subsidiary or separate operating division of TWA or New TWA,
>
> (ii) there will be no full or partial merger undertaken of the pilot seniority lists of the airline operated by TWA or New TWA ("TWA Airline") and such other airline ("Acquired Airline") without prior consent of ALPA,
>
> (iii) the fleet size of the TWA Airline as it existed immediately prior to such acquisition shall not be reduced by TWA or New TWA except to the extent airplanes can be sold or otherwise disposed of pursuant to Section 7 of the [August 5, 1985] Agreement,
>
> (iv) any exchange of airplanes between the TWA Airline and the Acquired Airline shall not be permitted to result in a substantial adverse impact on the group of pilots protected under the provisions of Letter of Agreement XIX between ALPA and TWA ("LOA #19") [a furlough protection agreement] because of changes in the makeup of the TWA Airline fleet,
>
> (v) if the annualized level of block hours of flying of the TWA Airline is reduced below 469,000 hours as a result of acquiring such other airline and the monthly credit/pay cap for TWA Airline pilots is lowered to 65 hours as provided

> in LOA #19, there shall be no furlough of Pilots protected under LOA #19 provided, however, that this shall not affect the application of LOA #19 in other circumstances . . . .

(App. 47-48).

During their negotiations with the Ozark pilots, the TWA pilots asserted that they—not ALPA President Henry Duffy or any other pilot group—possessed the "consent" power contained in section 10(a)(ii) of the Wraparound Agreement and, therefore, that ALPA Merger Policy did not apply to the Ozark-TWA merger. On the other side of the bargaining table, even though the TWA pilots were the only pilots who negotiated and were affected by the concessions given in the Wraparound, the Ozark pilots asserted that the "consent" power belonged to ALPA President Duffy (and not to the TWA pilots) and that ALPA Merger Policy applied to the Ozark-TWA merger.[4] TWA and Icahn—parties to the Wraparound—asserted that they granted the "consent" power to the TWA pilots in exchange for their wage and benefit concessions.[5]

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[4] In the lower courts, Petitioners asserted a claim against TWA for breach of the Wraparound Agreement. Concluding that the Wraparound gave rights only to the TWA pilots, the District Court stated that "[t]he Ozark pilots were therefore neither parties to nor third party beneficiaries of the wraparound agreement" (App. 48). The Court of Appeals found it unnecessary to decide this question (App. 18).

[5] Before the TWA pilots successfully negotiated certain protections for themselves in the event that TWA acquired or was acquired by another airline, the Ozark pilots had attempted, but failed, to negotiate similar protections into their pre-merger collective bargaining agreement with Ozark (O'Toole Dep. 355). Thus, their criticism of the TWA pilots' position regarding the Wraparound is nothing but a hypocritical by-product of their failure to achieve the same benefit achieved by the TWA pilots.

While the two pilot groups were negotiating over an integrated seniority list but making no progress, TWA made several business decisions during the fall of 1986 which affected the Ozark pilots, but which were allowed under the applicable collective bargaining agreements (App. 50). Four Ozark aircraft were transferred to the TWA fleet, 86 Ozark pilots were furloughed (*i.e.*, laid off) as a result of the aircraft transfer, the Ozark pilots' pension plan was terminated, and the Ozark-ALPA collective bargaining agreement was terminated with the TWA-ALPA collective bargaining agreement then being applied to the Ozark pilots.

In response to these actions, the Ozark pilots, with advice from their separately retained legal counsel, considered instituting various legal actions (*i.e.*, grievances, lawsuits, etc.) against Ozark and TWA. However, other than a single grievance challenging the termination of their pension plan—a grievance which was processed and settled by a new, negotiated pension plan—the Ozark pilots never initiated any legal action against Ozark or TWA.

The reason the Ozark pilots initiated no legal action is simple and uncontested in the record. The Ozark MEC concluded, with the advice of its legal counsel, that the Ozark pilots would lose any legal action they initiated challenging any of TWA's actions. Specifically, the Ozark MEC concluded that any claim relating to the termination of the Ozark-ALPA collective bargaining agreement was a "loser" (TWA Fact 92),[6] any claim relying on the successor clause in the Ozark-ALPA collective bargain-

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[6] Citations to "TWA Fact ____" refer to TWA's Statement of Material Facts as to Which There Is No Genuine Issue filed in support of its motion for summary judgment. Such facts cited in this brief were uncontested by Petitioners.

ing agreement did not have "much chance of success" (TWA Fact 108), any claim relating to the aircraft transfer had "little chance, if any, of success" (TWA Fact 108), and the chance of winning any claim relating to the termination of the Ozark pilots' pension plan was "very poor" (O'Toole Dep. 487-88). As Ozark MEC Chairman Michael O'Toole candidly summarized the situation for his pilot group: "[O]ur position was weak in virtually all areas" (TWA Fact 108).

As a result, the Ozark pilots decided to negotiate the best deal they could rather than to litigate and risk worsening their already "weak" positions (App. 39) ("It was the weakness of [the Ozark pilots'] bargaining position rather than any improper conduct by defendants that resulted in the Ozark pilots' large vote of approval."). Consequently, in December, 1986, the Ozark pilots returned to the bargaining table and negotiated the best agreements they could with the TWA pilots and TWA. Those agreements set forth the terms governing "the integration of the [Ozark pilots] into the TWA-ALPA agreement," resolved "all disputes regarding the terms and conditions of employment for the Ozark pilots," and called for the withdrawal of "[a]ll grievances, lawsuits and [Department of Transportation] complaints filed or initiated by the former Ozark pilots involving the merger of TWA and Ozark" (TWA Ex. 27 at p. A7615; TWA Facts 104, 111).

The negotiated agreements were not secretly agreed to by the Ozark MEC or forced upon the Ozark pilots by their MEC. Instead, the Ozark MEC and its attorneys held meetings with the Ozark pilots to explain the terms of the agreements, to discuss the benefits and disadvantages of the agreements, and to "allow the Ozark pilots to express their opinion[s] on whether or not to accept the agreement[s] under the conditions that existed at that

time" (O'Toole Dep. 215). In written materials provided to the Ozark pilots before a ratification vote was held, the Ozark MEC stated:

> The MEC and the Merger Committee recommend that you approve these agreements. We do so because we are convinced that the agreements are in the best interests of the Ozark pilots.

(ALPA Ex. 28). By an overwhelming margin (96%), the Ozark pilots ratified the agreements. As the District Court concluded, "[t]hat overwhelming ratification was not the result of any violation of the Ozark pilots' rights . . . but rather a rational decision that the Ozark pilots were better off ratifying the agreement than they would be taking their chances on an uncertain lawsuit during which many if not all of them might be out of work" (App. 50).

REASONS FOR DENYING THE WRIT

There are at least three reasons why certiorari should be denied as to TWA. *First*, almost the entire thrust of the petition relates to Petitioners' fair representation claim against ALPA. Indeed, just over one page of the petition is directed to TWA (pp. 25-27), and the statement of questions presented lists no issue directed to TWA. Because the petition does not raise a serious issue regarding TWA's conduct, it should be denied.

Second, Petitioners' principal argument supporting review with respect to TWA is that, in the event the Court concludes that ALPA breached its duty of fair representation, the lower courts should be directed to decide whether TWA participated in and facilitated ALPA's breach. As we show in Section II below, however, the undisputed record establishes that TWA did not participate in or facilitate ALPA's alleged breach (*i.e.*, its failure to implement

ALPA Merger Policy when the Ozark pilots wanted it implemented). Thus, such a remand would be pointless.

Third, Petitioners ask this Court to review the Court of Appeals' holdings that the Ozark pilots are bound by their ratification of the merger agreements and that TWA's exercise of economic power was lawful. In challenging these holdings, however, Petitioners do not explain why they merit review under this Court's standards for review. Petitioners identify no conflict among the circuits and offer no explanation as to why the Court of Appeals' holdings involve some important labor law question. The dispositive fact is that, in reaching these holdings, the Court of Appeals applied established principles of labor law under the Railway Labor Act ("RLA"), which governs labor relations of airlines, and other federal labor laws. Furthermore, the Court of Appeals' decision is fully consistent with the decisions of this Court, and does not conflict with decisions by other circuits. Indeed, Petitioners cite no case decided by this Court or by another court of appeals with which the Court of Appeals' decision conflicts. Therefore, the petition should be denied.

I.

The Court Of Appeals Correctly Concluded That The Collectively Bargained Agreements Ratified By 96% Of The Ozark Pilots Bar Their Claims Against TWA.

Petitioners do not and cannot genuinely contest that the collectively bargained agreements ratified by 96% of the Ozark pilots bar this lawsuit. Instead, they argue that the agreements should be voided because they were the product of "unlawful duress" (Pet. 26).

Petitioners' argument is fatally flawed in two respects. First, it is conspicuous that, throughout the lower court proceedings and before this Court, Petitioners have con-

tended that TWA's actions and proposed actions were "illegal." But at the time of the actions, the Ozark pilots' union leadership, with the advice of numerous experienced labor law attorneys, concluded otherwise. For example, Petitioners protest TWA's decision to terminate the Ozark-ALPA collective bargaining agreement and to apply the TWA-ALPA collective bargaining agreement to the Ozark pilots. At the time of that action, however, the Ozark pilots concluded—with the advice of their attorneys—that a legal attack against it was a "loser" (TWA Fact 92).[7] The Ozark pilots and their attorneys reached the same conclusion for all the other claims they contemplated filing. Thus, Petitioners are disingenuous in now asserting that certain actions taken by TWA seven years ago were unlawful when, at the time and in a position to mount a legal challenge to those actions,[8] they decided not to do

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[7] The reason such a claim was a "loser" is that under National Mediation Board decisions in effect in October, 1986, certifications held by unions on an acquired carrier like Ozark were automatically extinguished by "operation of law" when the carriers merged operations. *Republic Airlines, Inc.*, 8 N.M.B. 49 (1980). Consequently, any pre-merger collective bargaining agreements covering the acquired airline's employees (in this case the Ozark-ALPA collective bargaining agreement) also were automatically extinguished. *Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983). Thus, the Ozark pilots knew that attacking TWA's action would fail as a matter of law.

[8] The uncontested record establishes that as late as December 8, 1986—just several days before the final agreements were successfully negotiated—the Ozark pilots and their attorneys discussed possible grievances and other legal actions (TWA Facts 88, 91-93). In fact, draft grievances had been prepared and were ready for filing (TWA Fact 88). But the Ozark pilots decided not to pursue such action:

> During the course of the December 5th meeting . . . various courses of action were discussed. It was the expressed opinion of the ALPA people and [legal counsel] present that we

(Footnote continued on following page)

so because they and their attorneys concluded that a court, arbitrator, or administrative agency would find those actions to be lawful.[9]

Second, Petitioners' arguments relating to the legality of TWA's actions simply are red herrings. To debate whether TWA's actions and proposed actions were legal or illegal is to miss the crux of this case and to ignore the fundamental correctness of the Court of Appeals' and District Court's decisions. No court has overturned a collectively bargained agreement resolving a labor dispute because of allegedly "illegal threats" or "coercion" during negotiations. Nothing in the RLA, or in the federal labor laws generally, allows a party to strike its best deal to settle a labor dispute, and then reap the benefits of the agreement while it litigates to try to gain more by arguing that the deal had to be made because of the superior bargaining strength of the other party. To the contrary, the well-settled law under the RLA is that the process of labor negotiations is fundamentally one of "compromise and economic pressure." *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1281 (7th Cir. 1985) (*quoting NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981)). *See also Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 682 F. Supp. 1003, 1026 (W.D. Mo. 1988), *aff'd*, 878 F.2d 254 (8th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

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[8] *continued*

> had not a very good chance of succeeding in most of the litigation that we were contemplating . . . and that we were probaly better served or our people were better served by accepting what deal we could get.

(O'Toole Dep. 506-07).

[9] The District Court (App. 50) and the Court of Appeals (App. 17) likewise concluded that TWA did not violate any contractual or other legal obligation through its various actions and proposed actions.

Indeed, federal courts uniformly have held that economic coercion or threats of same made during the course of collective bargaining are not unlawful and cannot serve to vitiate a collectively bargained agreement. *Herring v. Delta Air Lines, Inc.*, No. CV87-5725-RJK (C.D. Cal. 1988) ("Because the collective bargaining process necessarily contemplates both the use and threatened use of economic weapons, the courts have refused to rescind labor contracts which might otherwise be considered coercive outside the context of labor negotiations."), *aff'd*, 894 F.2d 1020 (9th Cir.), *cert. denied*, 494 U.S. 1016 (1990); *ALPA v. Eastern Air Lines, Inc.*, 863 F.2d 891, 909 (D.C. Cir. 1988); *Parker v. Connors Steel*, 855 F.2d 1510, 1520 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Local No. 547, UAW v. NLRB*, 765 F.2d 175, 183-84 (D.C. Cir. 1985); *Line Drivers Local No. 961 v. W.J. Digby, Inc.*, 218 F. Supp. 519 (D. Colo. 1963), *aff'd*, 341 F.2d 1016 (10th Cir. 1965).[10] The Court of Appeals' decision is consistent with this settled authority:

> Straightened circumstances these were, but a decision to make the best of a poor position does not vitiate a choice. [citation omitted]. . . . TWA had every right to use economic pressure. To treat the pilots' response as voidable, making their vote a one-way street in which they could reap any benefit but would surrender nothing, would ensure that employers paid no heed to unions' promises in the future. A group disabled from making binding concessions can-

[10] The Ozark pilots themselves recognized and took advantage of this legal principle. Following execution of the agreements resolving all of the outstanding disputes, Ozark MEC Chairman O'Toole stated that the Ozark pilots' threat to file litigation might have pressured TWA to move off of its position, and that "[b]oth sides used whatever pressure was available to them" (TWA Fact 106).

> not expect anything in return. One of the principal objectives of labor law is peaceful, which is to say contractual, resolution of differences. When one side may abandon its promises by pleading hard circumstances, the institution of contract and all its benefits are imperiled.

(App. 18). The District Court reached the same conclusion (App. 50) ("Rough as it may be, the sort of economic pressure applied by TWA is common in labor disputes and is not of itself unlawful.").

The simple principle of this case, which the Court of Appeals correctly recognized and enforced, is that if the Ozark pilots believed that TWA had violated a collective bargaining agreement or the RLA, they should have challenged those actions immediately and directly through a grievance, lawsuit, or National Mediation Board proceeding. They did not have the right, however, to cut the best deal they could with whatever economic or legal leverage they possessed,[11] accept the benefits of those negotiated

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[11] Petitioners placed and continue to place great reliance on the fact that the Wraparound Agreement granted the consent power over a merged seniority list to "ALPA," which in their view only could mean ALPA National through the person of ALPA President Duffy. That certainly was an argument the Ozark pilots could have made and did make. However, they must acknowledge—as their attorneys did at the time—that there are compelling arguments that the Wraparound's "consent" power belonged to the TWA pilots. In particular, the intent of the parties who actually sat at the bargaining table and negotiated the Wraparound—Icahn, TWA and TWA MEC Chairman Harry Hoglander—was to provide benefits only to the TWA pilots and nobody else (TWA Facts 36, 40; Hoglander 01/25/89 Dep. 95). Thus, regardless of what the Ozark pilots or President Duffy thought regarding who possessed the "consent" power, this evidence could have crushed the Ozark pilots' argument. Because of the prospect that they would lose if they pushed the issue to litigation, the Ozark pilots rationally concluded that negotiation was the more prudent course of action.

agreements after they were put in place (*i.e.*, guaranteed captain and first officer positions for three years, even though by virtue of their seniority many of the Ozark pilots would not have been able to hold such positions),[12] and then turn around and file a lawsuit seeking to obtain greater benefits than the agreements provided to them.

Under the RLA, the Ozark pilots could have either litigated or negotiated a final resolution of their claims—but not both. By choosing a negotiated agreement, Petitioners are bound by that resolution. The Court of Appeals' decision correctly recognizes that Petitioners' position conflicts with the RLA's requirement that parties "make and maintain agreements" (45 U.S.C. § 152 First), is inconsistent with the RLA's stated public policy encouraging parties to settle all disputes (*Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969)), jeopardizes the enforceability and validity of countless collective bargaining agreements which followed a party's (the employer, the union, or both) exercise of economic pressure during negotiations, and has been rejected by every court which has addressed similar arguments.[13] Accordingly, the Court of Appeals' decision is correct and does not require review by this Court.

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[12] It is significant that Petitioners did not seek to enjoin the merger agreements in this proceeding until November, 1989—three years after the agreements were reached and just before Petitioners' guaranteed status in the cockpit under the agreements was to expire. Their motion for injunctive relief was denied.

[13] At page 27 of their petition, Petitioners cite four cases which purportedly support their position that a court has the power to void the agreement ratified by the Ozark pilots because of the allegedly unlawful economic pressure applied by TWA. Interestingly, none of these cases was relied upon by Petitioners before the Court of Appeals. Moreover, none of the cases even remotely sup-

(Footnote continued on following page)

II.

TWA Remains Entitled To Judgment On The Fair Representation Claim, Regardless Of The Disposition Of The Claim Against ALPA.

As discussed previously, the thrust of the petition challenges the Court of Appeals' decision that ALPA did not breach its duty of fair representation. TWA agrees with the Court of Appeals' decision that ALPA did not breach its duty of fair representation.[14] Consequently, Petitioners' fair representation claim automatically fails as to TWA. However, even if ALPA is found to have breached its duty, the judgment in favor of TWA remains proper and should be left undisturbed.

In order to hold TWA liable with ALPA for ALPA's breach of its duty of fair representation, Petitioners must

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[13] *continued*
ports this proposition. For example, in *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747 (3d Cir. 1977), the court invalidated a collective bargaining agreement because the agreement had not been ratified by the membership, which was a requirement under the union's constitution—a requirement that the employer knew of. The case had nothing to do with economic pressure during collective bargaining negotiations and a conscious decision ratified by the membership of the bargaining unit to reach a collectively bargained agreement rather than to litigate. Similarly, Petitioners cite *Union Pacific Railroad Co. v. Public Service Commission of Missouri*, 248 U.S. 67 (1918). This case, however, did not even arise in an employer-employee context, let alone in the context of collective bargaining.

[14] It is noteworthy that, although the Court of Appeals joined this case with *Rakestraw v. ALPA, petition for cert. filed*, 61 U.S.L.W. 3790 (U.S. May 11, 1993) (No. 92-1798) for purposes of stating the general principles of fair representation law, the two cases are dramatically different in terms of the factual record relating to ALPA's alleged breach of its duty of fair representation. Regardless of what disposition this Court may make in *Rakestraw*, the petition here should be denied.

prove that TWA acted in collusion with ALPA. *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985). The alleged breach in this case centers upon ALPA President Duffy's failure to implement ALPA Merger Policy when the Ozark pilots demanded that it be implemented. The decisions whether to implement and when to implement ALPA Merger Policy belonged to and were made exclusively by Duffy and the ALPA Executive Committee. There is not a shred of evidence in the record that TWA colluded with Duffy or the Executive Committee in their decisions to delay implementation of ALPA Merger Policy (or in any of their decisions affecting the Ozark pilots). Thus, even if the Court of Appeals erred in its fair representation finding with respect to ALPA, that would have no effect on TWA's entitlement to judgment on Petitioners' fair representation claim.

CONCLUSION

The petition for writ of certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID A. HAMMOND, *et al.*,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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QUESTION PRESENTED FOR REVIEW

Whether the court below correctly determined that the Air Line Pilots Association, International did not breach its duty of fair representation when its actions in connection with the acquisition by one airline of another were designed to protect the best interests of the plaintiff pilot class and were neither discriminatory, in bad faith, nor wholly irrational, and the plaintiff class overwhelmingly ratified the seniority integration agreements which their lawsuit attempts to vacate?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-30

DAVID A. HAMMOND, *et al.*,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

In 1986, Trans World Airlines, Inc. ("TWA") agreed to acquire Ozark Airlines, Inc. ("Ozark"). Thereafter, negotiations were conducted between the Ozark and TWA pilots to arrive at an integrated pilot seniority list. With the extensive mediatory assistance of the Air Line Pilots Association, International ("ALPA"), the exclusive bargaining representative of both pilot groups, agreements were reached between the two pilot groups, through their chosen representatives, and with TWA (the "Merger Agreements"). The Ozark pilots (the plaintiffs in this lawsuit) demanded and were granted the right to have the final say on whether the Merger Agreements could be implemented. After being briefed on the Agreements and advised of the alternatives to ratification, the Ozark pilots voted for the Agreements by a 329 to 35 margin.

The Seventh Circuit affirmed the District Court's determination that ALPA did not breach its duty of fair representation ("DFR") in connection with the seniority integration because ALPA's actions were rationally related to legitimate objectives and were neither discriminatory nor undertaken in bad faith. The appellate court's ruling is fully consistent with DFR decisions of this Court and other appellate courts and presents no issues of importance warranting review.

COUNTERSTATEMENT OF THE CASE

The following counterstatement is offered to provide a more "accurate description" of the facts and proceedings below than that provided by petitioners. App. 43.[1]

A. The Facts

In 1985, Texas Air Corporation, headed by Frank Lorenzo, tried to acquire TWA. The TWA pilots greatly feared a Lorenzo takeover. To counter Lorenzo, the TWA pilots assisted a competing takeover effort by Carl Icahn, offering to accept massive concessions if Icahn prevailed, which he eventually did. In exchange, Icahn agreed, in a document known as the "Wraparound Agreement," that if Icahn/TWA subsequently acquired another airline, the TWA pilots would be protected against any reduction in or transfer of TWA aircraft, and that ALPA's consent would be required for any merger of the pilot seniority lists of TWA and the acquired carrier. App. 3, 46-48; *see generally Barthelemy* v. *Air Line Pilots Ass'n, Int'l,* 897 F.2d 999, 1003-04 (9th Cir. 1990). These protections were in addition to furlough

[1] "App. ——" refers to the appendix submitted with the petition for a writ of certiorari. "Pet. ——" refers to the petition. Deposition transcript excerpts ("Tr.") and declarations ("Decl.") from the record on appeal are cited by the name of the deponent or declarant. Document exhibits are identified by party and "Ex." number. All references to the record on appeal are to materials in docket number R.159 unless otherwise indicated.

(layoff) protections that the TWA pilots had acquired as a quid pro quo for other pre-Icahn concessions. TWA Ex. 8.

In 1986 TWA acquired Ozark. App., 4. The Ozark pilots did not have contractual protections comparable to the aforementioned protections that the TWA pilots enjoyed. App., 4, 17, 46-48, 50.

After TWA agreed to acquire Ozark, a disagreement arose between the TWA and Ozark pilot groups over how best to merge their seniority lists. The more senior TWA pilot group favored an integration based on the date each pilot was hired by his respective airline. App., 4. The Ozark pilots (*contra* Pet., p. 3) proposed a different integration methodology which furthered their interests. App., 4.

Under ALPA's internal merger policy—which is *not* binding on air carriers, App., 17—the pilots employed by merging carriers initially attempt to arrive at a seniority integration agreement through negotiations, "with the help of a professional mediator if necessary." Pet., p. 2. Arbitration is utilized only if a prescribed lengthy period of negotiations and mediation does not produce an agreement. App., 4 (*contra* Pet., p. 2). In order to best serve the affected pilots' interests, ALPA, when implementing merger policy, necessarily takes into account the circumstances presented by a particular transaction. R.196, Duffy Decl., ¶¶ 2-3; Duffy Tr. 65-66, 78-80; *see* App., 17 (and *contra* Pet., pp. 2, 15, 18, 19).

The two pilot groups disagreed over whether ALPA's merger policy was applicable to the TWA-Ozark transaction: the Ozark pilots argued that it was; the TWA pilots believed the policy was superceded by the Wraparound Agreement. App., 43. Notwithstanding the TWA pilots' position, the two pilot groups proceeded as they would have under merger policy, attempting to negotiate an agreement. R.156, ¶ 30 and R.167, ¶ A-30.

Both the Ozark pilots and ALPA recognized that a prompt integration was essential to protect the Ozark pilots from "calamitous" consequences which the TWA-Ozark transaction threatened, including a serious risk of Ozark pilot furloughs. App., 17, 43. To accomplish that objective and prevent "premature intra-union litigation" and warfare which were likely to result from formal implementation of merger policy at that time, App., 18, 43-44; Duffy Tr. 143-44, ALPA established an approach for achieveing an integrated seniority list which was functionally equivalent to that prescribed by the merger policy, assigning an experienced mediator to assist the two groups in their efforts to negotiate an integrated list. App., 4, 18; ALPA Ex. 24. Through these efforts, the differences between the two groups were substantially narrowed. Ettel Tr. 109-11, 129-33, 178-79 and ALPA Exs. 70, 78-79. ALPA additionally sought to protect the Ozark pilots by petitioning the Department of Transportation, the courts and Congress to condition approval of the carriers' merger on TWA's adherence to labor protective provisions. App., 5.

While the integration efforts continued, TWA unilaterally acted to transfer four aircraft, of a type operated pre-merger by both airlines, from Ozark to TWA, laid off 86 Ozark pilots and threatened further transfers and furloughs. App., 4, 18, 50. In response, ALPA offered to initiate and pursue any legal challenges the Ozark pilots desired. App., 43, 50. TWA's actions, however, were not prohibited by the Wraparound Agreement (which, *contra* Pet., pp. 6-7, 22, "barred shrinkage at TWA but not a transfer of planes into TWA," App., 4; *supra*, p. 2), the ALPA-Ozark collective bargaining agreement (the "CBA"), *supra*, p. 3, or merger policy (to which TWA was not bound, App., 17).

When the initial mediation efforts had not produced a complete agreement, ALPA proceeded as the Ozark pilots desired, R.196, Ettel Tr. 57 (*contra* Pet., p. 5) and against the wishes of the TWA pilots (*contra* Pet., p. 4),

by formally initiating merger policy, App., 43, 50, and, taking account of the prior mediation efforts, shortened the time period before either group could trigger arbitration. O'Toole Tr., 191-92. With the assistance of ALPA-appointed "super-mediators," the pilot groups reached an agreement between themselves and with TWA upon an integrated list which dovetailed the seniority of the two pilot groups, granting all pilots identical credit for their seniority at their respective carriers. App., 4-5, 18-19, 43-44, 53. The Ozark pilots were additionally granted "protective cells," guaranteeing many of them captain and first officer positions which their seniority on the integrated list would not have otherwise entitled them to hold and which would have otherwise gone to TWA pilots. App., 5 (*contra* Pet., pp. 5-6, 19—suggesting, on the basis of a single TWA pilot's assessment, that Merger Agreements had no adverse impact on TWA pilots).

The Ozark pilots demanded and were granted the right to make "the ultimate decision" whether to approve the integration. O'Toole Tr. 214-18; Yaiser Tr. 29-30. After being provided copies of and briefed on the Merger Agreements, afforded an opportunity to ask questions of their chosen representatives and counsel, and advised of the consequences of their vote and available alternatives (including returning to the bargaining table, proceeding under merger policy, and/or instituting litigation—all of which ALPA continued to offer), R.156 ¶¶ 67, 69, 70 and R.167, ¶ A-67, 69, 70; R.196 Duffy Decl., ¶ 9, the Ozark pilots approved the integration by a better than 9 to 1 margin. App., 4-5, 48, 50. Only after and because of the Ozark pilots' affirmative vote did ALPA President Henry Duffy give the Union's consent to the seniority integration (contrary to the suggestion at Pet., pp. 10, 18 that it was ALPA that determined the seniority integration) which was required for the integration to be effective under the Wraparound Agreement. App., 4, 10, 50.

B. Proceedings Below

Plaintiffs filed a class action suit on behalf of the former Ozark pilots claiming that ALPA breached its DFR, for which TWA was jointly responsible, by delaying formal implementation of merger policy. App., 5, 18, 42-45. Plaintiffs additionally alleged violations of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 *et seq.*, the Wraparound Agreement and the Ozark-ALPA CBA. App., 5, 18, 46, 49-52.

The district court initially ruled that ALPA "did not breach its duty of fair representation" and that "the Ozark pilots were not coerced in any manner that would vitiate" their "overwhelming" vote "in favor of approval of the terms of which plaintiffs complain." App., 35, 38-39. The Seventh Circuit denied plaintiffs' motion for summary reversal, App., 36-37, remanding "for the limited purpose of allowing the district court to enter a complete statement of [the] reasons" for its ruling. App., 37.

The district court's subsequent memorandum decision, App., 40-54, applied the DFR standard established by this Court to the record in this case, App., 42-46, and found that "there is no genuine issue of material fact as to whether ALPA's actions were arbitrary, discriminatory, or in bad faith; they were not." App., 46. Among other things, the district court found that: any delay in formal merger policy implementation was the result of ALPA's attempt "to obtain the best bargain possible" for the Ozark pilots while "resolv[ing] the seniority-list-integration issue on a basis acceptable to both pilot groups," App., 44, 50; the settlement which plaintiffs' lawsuit challenged was a product of the "incredibly weak" bargaining position of the Ozark pilots, "rather than a breach of ALPA's [DFR]", App., 44; any legal challenge against TWA was "uncertain" and could have resulted in "a lengthy period of joblessness for the Ozark pilots," App., 43, 50; there

was "no coercion or duress that would vitiate" the Ozark pilots' overwhelming vote in favor of the Agreements, App., 53; and there was no evidence that ALPA's conduct was improperly motivated. App., 44-45. The district court further concluded that the Ozark pilots possessed no rights under the Wraparound Agreement which were breached and that their overwhelming vote in favor of the Merger Agreements was not the product of any LMRDA violation "but rather a rational decision that the Ozark pilots were better off ratifying the agreement" than pursuing "an uncertain lawsuit," and disposed of their other breach of RLA and contract claims against TWA. App., 46-53.

The court of appeals unanimously affirmed.[2] It found that: ALPA merger policy was not binding on TWA and "could not compel TWA to agree to anything," App., 17; the Wraparound Agreement imposed no limits on TWA's ability to move aircraft from Ozark to TWA, to "put TWA's pilots to work in [the Ozark] cockpits," and to otherwise "apply[] the screws" to the Ozark pilots, App., 4, 17-18; and rotely "[c]ramming the 'merger policy' down the throats of an unwilling cadre at TWA" would have impeded efforts to reach a seniority integration agreement, which "could have been calamitous for Ozark's pilots." App., 17. The appellate court further determined that: ALPA's merger policy was not etched in stone and did not prohibit "experimentation and change when circumstances warrant," App., 17; ALPA actions reflected its attempts to amicably "bridge the gap between Ozark's and TWA's pilots," and avoid "premature intra-union litigation," App., 17-18; the agreed-upon dovetailed integration reflected a rational result, App., 16; ALPA withheld its consent to a seniority integration until the pilot groups had reached an agreement, which the Ozark pilots overwhelming approved, App., 4, 18; and ALPA's actions were "rationally related to a legitimate objective." App.,

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[2] The decision also addressed another DFR case, *Rakestraw* v. *United Airlines, Inc.*

15. The court also found that ALPA had made additional efforts before Congress, governmental agencies and in the courts to protect the Ozark pilots. App., 5.

The Seventh Circuit concluded, based on the record, that plaintiffs' allegations of ALPA wrongdoing were without evidentiary support and that ALPA's actions met all three prongs of the DFR standard: they did not fall "so far outside a 'wide range of reasonableness' " as to have been "arbitrary," App., 10-11, 16-17; *Air Line Pilots Ass'n, Int'l* v. *O'Neill,* 111 S.Ct. 1127, 1135-36 (1991) (citation omitted); they did not discriminate against the Ozark pilots "for a reason forbidden on substantive grounds, such as race or internal union politics," App., 11, 17-18, and thus did not reflect "invidious 'discrimination' of the kind prohibited" by the DFR, *O'Neill,* 111 S.Ct. at 1137; and they did not in "bad faith" intentionally injure the plaintiffs. App., 11-13, 17-18. The court held that plaintiffs' remaining claims "founder[ed] on their own vote in favor of the merger and the ensuing new collective bargaining agreement," App., 18-19, which further dispelled any claim that ALPA's alleged wrongs had caused plaintiffs' injury. App., 19. The court further held that to permit plaintiffs to disavow their overwhelming approval of the integration as allegedly coerced would ignore the factual and legal reality ("TWA had every right to use economic pressure," App., 18) and conflict with the "peaceful . . . contractual resolution of differences" which is "[o]ne of the principal objectives of labor law." App., 18.

The appellate court denied plaintiffs' petition for rehearing and suggestion for in banc rehearing. App., 26-27.

SUMMARY OF ARGUMENT

The decision below involves the application of established DFR principles to undisputed facts and is consistent with decisions of this and other appellate courts. The petition presents no issues warranting Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT

The petition principally urges that review is needed because the decision below allegedly "collapsed" this Court's tripartite DFR standard into "a single rationality test." Pet., pp. 9, 11, 13. This contention rests on a misunderstanding of the standard and a mischaracterization of the ruling below. The appellate court's decision is fully consistent, both in approach and result, with this Court's DFR rulings.

A. Under the DFR standards articulated by this Court, union actions breach the DFR only if they are discriminatory, in bad faith, or "wholly 'irrational' or 'arbitrary.'" *Air Line Pilots Ass'n, Int'l* v. *O'Neill,* 111 S.Ct. 1127, 1136 (1991); *see Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967). Unions are to be accorded wide latitude and deference in addressing the competing interests of represented employee groups. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953); *Humphrey* v. *Moore,* 375 U.S. 335, 349-50 (1964); *O'Neill,* 111 S.Ct. at 1135-37. Further, union conduct must be evaluated in light of "the strong policy favoring the peaceful settlement of labor disputes" as well as "the facts and the legal climate that confronted the [union] at the time [its] decision was made." *O'Neill,* 111 S.Ct. at 1136. Contrary to the petition, pp. 11, 12, this Court has not mandated a rigid analytical approach that the lower courts must mechanically follow in applying the DFR standard.

B. The court below could hardly be said to have "disparage[d]" or "repudiat[ed]" this Court's DFR standard (*contra* Pet., pp. 9, 11) when it applied that standard in light of its application in prior decisions of this Court and other appellate courts, App., 10-15, rather than by focusing solely on the "arbitrary," "discriminatory" and "bad faith" "labels" which, as the court aptly observed, "are not self-defining." App., 11. The appellate court's ap-

proach was identical to that which has been followed by this Court and other appellate courts.[3]

The appellate and district courts measured ALPA's conduct against each prong of the DFR standard (*contra* Pet., pp. 11-14). They evaluated ALPA's actions based on "the situation in which ALPA found itself, [and] what ALPA did," App., 43, and, in "light of both the facts and the legal climate" that then confronted the union, *O'Neill,* 111 S.Ct. at 1136, and determined that ALPA did not act arbitrarily in delaying formal policy implementation while simultaneously pursuing an approach which was fully consistent with the merger policy's seniority integration procedures and by otherwise acting to protect the Ozark pilots. As the lower courts correctly concluded, ALPA acted to "bridge the gap" between the two pilot groups, to "obtain the best bargain possible" for the Ozark pilots and to protect them from "premature intra-union litigation" and the "calamitous" consequences with which they were threatened. App., 17, 18, 42-44, 50.

Further, the appellate court did not, *contra* Pet., pp. 10, 23, ignore plaintiffs' accusations of bad faith or discriminatory ALPA conduct. Instead, it again turned to other cases for guidance to ascertain the parameters of those components of the DFR standard, and, like the district court, carefully reviewed the record presented. The Seventh Circuit recognized that "a union may not take away the seniority of some employees for no reason other than that the losers have too few votes to affect the out-

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[3] *E.g., O'Neill,* 111 S.Ct. at 1135-37; *Humphrey,* 375 U.S. at 342; *Chaparro-Febus* v. *International Longshoremen Ass'n, Local 1575,* 983 F.2d 325, 330-31 (1st Cir. 1992); *Bennett* v. *Local Union 66, Glass Workers Int'l Union,* 958 F.2d 1429, 1437-38 (7th Cir. 1992) (cited at Pet., p. 17); *Gvozdenovic* v. *United Air Lines,* 933 F.2d 1100, 1106-07 (2d Cir.), *cert. denied,* 112 S.Ct. 305 (1991); *Ackley* v. *Local 337, Int'l Bhd. of Teamsters,* 910 F.2d 1295, 1307-08 (6th Cir. 1990) (original dissenting opinion adopted as opinion of court on rehearing in light of intervening *O'Neill* decision, *see* 948 F.2d 267 (6th Cir. 1991)).

come of an intra-union election, or that they opposed the union's leadership," or "sell an employee down the river for no reason at all, or for a reason forbidden on substantive grounds, such as race or internal union politics." App., 11. Thus, the court did not (*contra* Pet., p. 10 and App., 31, dissent from denial of rehearing) view "rote majority rule" as the measure of the DFR. However, the court also correctly recognized that plaintiffs must do more than simply affix "discrimination" or "bad faith" "label[s]" to ALPA's actions. App., 15. Turning to the evidence, the lower courts found nothing which demonstrated (*contra* Pet., pp. 22-23) that ALPA acted "to placate a larger more politically powerful segment of its membership at the expense of a much smaller, weaker group; [or] to advance the political interest of its President, Hank Duffy," App. 44; *id.*, 11, 13, 17-18, or that ALPA acted in bad faith. App., 11, 12, 15, 17-18, 45.[4]

Any claim of discrimination or bad faith was further dispelled by ALPA's extensive efforts specifically aimed at protecting the Ozark pilots, *supra*, pp. 4-5, by ALPA's willingness "to back the Ozark pilots if they chose to stand on their presumed rights and not ratify" the Merger Agreements, App., 50, and to withhold consent unless and until the Ozark pilots approved the Agreements, App., 4, 18, 50, and by the identical treatment accorded both pilot groups through the dovetailing of the seniority lists. App., 16. *See Humphrey*, 375 U.S. at 347 (dovetailing is "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake" of a merger or acquisition).[5]

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[4] The appellate court's discussion of "mixed motives" on which the petition focuses, *see* Pet., p. 24, pertained only to the *Rakestraw* case. App., 19-20. As indicated, the lower courts found no evidence of improper ALPA motivation in *Hammond*.

[5] As the court below correctly observed, even "endtailing" of merging employee groups has been held to satisfy the DFR. App., 16; *Schick* v. *NLRB*, 409 F.2d 395, 398-99 (7th Cir. 1969); *Ackley*, 948 F.2d at 267; *Marshall* v. *Local 6, Brewers and Gen. Labor*

In sum, there is no divergence between the decision below and this Court's DFR caselaw which warrants Supreme Court review.

II. THE DECISION BELOW DOES NOT ESTABLISH ANY CONFLICT WITHIN THE CIRCUITS WARRANTING REVIEW BY THIS COURT

Plaintiffs also cannot establish that the decision below presents a conflict within the circuits or raises "recurring issues concerning the scope of each of the three prongs" of the DFR standard, Pet., p. 15, that require intervention by this Court.

A. Since this Court "clarified the [DFR] standard" in *O'Neill*, 111 S.Ct. at 1130, the lower courts have not demonstrated any difficulty in understanding its parameters. The standard has been consistently applied in all circuits, including the Seventh. For example, the appellate courts, like *Hammond*, *supra*, pp. 8, 10-11, have recognized that under the DFR standad established by this Court (and *contra* Pet., pp. 20-21), intentional union misconduct must exist to establish a "discriminatory" or "bad faith" DFR breach.[6] *O'Neill*, 111 S.Ct. at 1137

Dep'ts, 960 F.2d 1360, 1370 (8th Cir. 1992); *NLRB* v. *Whiting Milk Corp.*, 342 F.2d 8, 11 (1st Cir. 1965); *see also Chaparro-Febus*, 983 F.2d at 330-31 (cannot establish DFR breach merely by showing that the seniority system selected favors one employee group over another); *O'Neill* v. *Air Line Pilots Ass'n, Int'l* (on remand), 939 F.2d 1199, 1204 (5th Cir. 1991) (same).

[6] *Carter* v. *United Food Workers Int'l Union, Local 789*, 963 F.2d 1078, 1082 (8th Cir. 1992) (cited at Pet., p. 12) ("union intentionally and invidiously discriminated against" a protected class); *Bennett*, 958 F.2d at 1436-37, 1438 n.6 (Pet., p. 17) ("somewhat harder to find intentional misconduct," as required under DFR bad faith element, than arbitrary action by union); *Aguinaga* v. *United Food Workers Int'l Union*, 993 F.2d 1463, 1470 (10th Cir. 1993) (Pet., pp. 12, 13, 17, 23, 25) (discrimination and bad faith prongs require showing of "invidious" discrimination and "fraud, or deceitful or dishonest action," respectively); *Ooley* v. *Schwitzer Div.*,

(plaintiff must demonstrate "invidious 'discrimination' "); *Humphrey*, 375 U.S. at 348 (must demonstrate "substantial evidence of fraud, deceitful action or dishonest conduct"); *see also Amalgamated Ass'n of Street & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 301 (1971).[7]

B. Plaintiffs cannot manufacture an inter-circuit conflict warranting review simply by pointing to other decisions in which the DFR has been found to have been breached based on factual circumstances which differ radically from those found in *Hammond*. For example, the Ozark pilots were not denied input into the determination of their seniority (as in *Bernard* v. *Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 216-17 (9th Cir. 1989) (Pet., pp. 13-14, 16, 18-20) and *Beardsley* v. *Chicago & North Western Transp.*, 850 F.2d 1255, 1269 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (Pet., p. 21)), or denied a promised contract ratification (as in *Alexander* v. *International Union of Op. Eng'rs*, 624 F.2d 1235, 1240 (5th Cir. 1986), *International Bhd. of Teamsters* v. *NLRB*, 587 F.2d 1176, 1183 (D.C. Cir. 1978), and

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Household Mfg. Inc., 961 F.2d 1293, 1303-04 (7th Cir.), *cert. denied*, 113 S.Ct. 208 (1992) (requiring "invidious discrimination" to satisfy discrimination prong); *Chaparro-Febus*, 988 F.2d at 330-31 (union's determination on seniority must amount to "invidious discrimination" to breach DFR); *O'Neill* (on remand), 939 F.2d at 1203 (ALPA's actions not "sufficiently egregious," "intentionally misleading" or "invidious" enough to establish bad faith DFR breach); *Ackley*, 910 F.2d at 1307-08 (original dissenting opinion —adopted as the court's opinion on rehearing in light of *O'Neill*, *see* 948 F.2d 267—no DFR breach where union did not discriminate against a protected group); *see also Alicea* v. *Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990); *Jones* v. *Union P. & R. Co.*, 968 F.2d 937, 941 (9th Cir. 1992) (Pet., p. 12) (DFR "is narrowly construed by the courts . . . so that unions may act freely in what they perceive are the best interests of their members generally").

[7] Contrary to Pet., p. 10, *O'Neill* only questioned the Seventh Circuit's use of an intentional misconduct requirement as applied to the "arbitrary" prong of the DFR standard. 111 S.Ct. at 1134-35.

Trail v. *International Bhd. of Teamsters*, 542 F.2d 961, 968 (6th Cir. 1976) (all cited at Pet., p. 17)). Neither did ALPA ignore its merger policy, *Bernard*, 873 F.2d at 216-17; *cf. Nellis* v. *Air Line Pilots Ass'n, Int'l*, 815 F.Supp. 1522, 1533, 1539 (E.D. Va. 1993) (Pet., pp. 16, 17) (no DFR breach where ALPA, as here, did not "ignore" its merger policy and undertook reasonable steps to benefit and protect plaintiffs' interests), otherwise discriminate against a protected class or act in bad faith (as in *Carter*, 963 F.2d at 1082 (Pet., p. 12) and *Denver Stereotypers Union, Local 13* v. *NLRB*, 623 F.2d 134, 137-38 (10th Cir. 1980) (Pet., p. 17)), or bargain away substantive rights already conferred upon a minority group in a collective bargaining agreement (as did the unions in *Beardsley*, 850 F.2d at 1269, *Goclowski* v. *Penn Central Transp. Co.*, 571 F.2d 747, 751 (3d Cir. 1977) (Pet., pp. 17, 26),[8] *Aguinaga*, 993 F.2d at 1470-71 (Pet., pp. 12-13, 17, 23, 25), *Colon Velez* v. *Puerto*

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[8] On remand in *Goclowski*, the district court concluded that the union, as here, did not contract away plaintiffs' seniority rights, but instead "acted to protect the interests of these employees as best it could." 545 F. Supp. 337, 346-47 (W.D. Pa. 1982), *aff'd*, 707 F.2d 1401 (3d Cir. 1982). *See also Association of Contracting Plumbers* v. *Local Union 2, United Ass'n of Journeymen*, 841 F.2d 461, 469 (2d Cir. 1988) (Pet., p. 17) (affirming lower court ruling that the union's breach of its constitution "does not give rise to a duty of fair representation" claim); *Walk* v. *P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1329-30 (6th Cir. 1992) (Pet., p. 12) (affirming summary judgment because union's conduct, at most, amounted to "negligen[ce]" or a "mistake in judgment, [which is] not a basis for finding a failure of fair representation").

Contrary to Pet., p. 16, the issue in *United Steelworkers* v. *Rawson*, 495 U.S. 362, 376 (1990), was not whether the union violated its DFR, but whether it had assumed and violated a contractual obligation to employees under a CBA. Further, even if, as plaintiffs contend, Pet., p. 16, the merger policy is somehow analogous to a CBA, plaintiffs asserted no breach of contract claim based upon an alleged violation of the merger policy. Even if they had, ALPA's actions in establishing procedures consistent with its merger policy negate any claim that ALPA "fail[ed] to act" on any obligation owed to plaintiffs. *Rawson*, 495 U.S. at 375.

Rico Marine Management, Inc., 957 F.2d 933, 940-41 (1st Cir. 1992) (Pet., p. 12) and *Volkmen* v. *United Transp. Union*, 724 F.Supp. 1282, 1329-31 (D. Kan. 1989) (Pet., p. 21)).[9]

In sum, plaintiffs have not identified and cannot establish any conflict in the circuits over the application of the DFR standard.

III. REVIEW IS UNWARRANTED BECAUSE PLAINTIFFS CANNOT PREVAIL ON THEIR DFR CLAIM

Review of the decision below is additionally unwarranted because it would serve no purpose. The Ozark pilots' overwhelming approval of the Merger Agreements eliminated their ability to prove, as required, that ALPA was legally responsible for the injuries they allegedly suffered. App., 19 ("A wrong is actionable only when it causes injury . . ."); *Marshall* v. *Local Union 6*, 756 F.Supp. 408, 413 (E.D. Mo. 1991) (ratification of seniority agreement is "intervening event which eliminated" any improper union actions), *aff'd in part and rev'd in part*, 960 F.2d 1360, 1370 (8th Cir. 1992) (no DFR breach where union negotiated modified endtailing agreement which employees ratified); *Nicely* v. *USX*, 767

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[9] Consistent with the Seventh Circuit's determination that the merger policy did not strip ALPA of its ability to take actions designed to protect the interest of those employees it represented, other courts have afforded unions "flexib[ility]" in applying internal constitutions and policies in integrating seniority lists or in otherwise protecting employee interests. *Allen* v. *United Transp. Union*, 964 F.2d 819, 821 (8th Cir. 1992); *Air Wisconsin Pilots Protection Comm.* v. *Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991); *Baker* v. *Newspaper Union, Local 6*, 628 F.2d 156, 166 (D.C. Cir. 1980); *Nellis*, 815 F. Supp. at 1538-40; *Bates* v. *Locomotive Firemen, No. 472*, 56 L.R.R.M. (BNA) 2271, 2274 (M.D. Fla. 1964); *Norris* v. *Northeast Ill. R.R. Bd.*, 126 L.R.R.M. (BNA) 2954, 2958 (N.D. Ill. 1987); *Warner* v. *McLean Trucking Co.*, 136 L.R.R.M. (BNA) 2633, 2637-38 (S.D. Ohio), *appeal dismissed*, 137 L.R.R.M. (BNA) 3000 (6th Cir. 1991).

F.Supp. 728, 731-32 (W.D. Pa. 1991), *aff'd,* 928 F.2d 13 (3d Cir. 1992).[10]

The Ozark pilots' informed and "voluntary" vote, *contra* Pet., p. 26, could "not be withdrawn because the choice was an effort to make the best of a bad situation," or because plaintiffs later "wish they could have made better deals." App., 18-19. *Accord* App., 50, 53. Collective bargaining agreements entered into when prospects are dire are no less binding than those fashioned in a favorable economic climate. *Parker* v. *Connors Steel,* 855 F.2d 1510, 1520-21 (11th Cir. 1988) (affirming summary judgment for union against employees who ratified concessionary agreement after company threatened to close plant), *cert. denied,* 490 U.S. 1066 (1989); *Baker,* 628 F.2d at 166; *Sutton* v. *Weirton Steel Div. of Nat'l Steel,* 724 F.2d 406, 409, 412 (4th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984); *Macktal* v. *Secretary of Labor,* 923 F.2d 1150, 1156 n.26 (5th Cir. 1991). TWA legally "had every right to use economic pressure" in furtherance of its objectives, however repugnant that may have been to the Ozark pilots or ALPA. App., 18. The courts below properly rejected plaintiffs' attempt to disavow their vote as the product of "coercion." App., 18-19, 53.[11]

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[10] *Accord Anderson* v. *United Paperworkers, Int'l,* 641 F.2d 574, 580 (8th Cir. 1981); *Ackley* v. *Western Conf. of Teamsters,* 958 F.2d 1463, 1472-73 (9th Cir. 1992); *Acri* v. *International Ass'n of Mach.,* 781 F.2d 1393, 1397 (9th Cir.), *cert. denied,* 479 U.S. 816 (1986); *Deboles* v. *Trans World Airlines,* 552 F.2d 1005, 1019-20 (3d Cir.), *cert. denied,* 434 U.S. 837 (1977); *Ooley,* 961 F.2d at 1304; *Wood* v. *International Bhd. of Teamsters, Local 406,* 807 F.2d 493, 502-03 (6th Cir. 1986), *cert. denied,* 483 U.S. 1006 (1987); *Self* v. *Drivers Local 61,* 620 F.2d 439, 443 (4th Cir. 1980); *see Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 572 (1976).

[11] The dissent from the Seventh Circuit's denial of a rehearing in banc nowhere even suggests that ALPA's actions in the TWA-Ozark transaction violated the DFR. App., 27-32.

Plaintiffs also cannot establish that ALPA caused them injury when the record conclusively establishes, contrary to Pet., pp. 4-5, 10, 21, 23, 24, that "TWA, not the union, was applying the screws," App., 18, and alone made the decisions to transfer Ozark planes and furlough Ozark pilots, *supra*, pp. 4, 7, 8; App., 50 ("economic pressure applied by TWA")—carrier decisions that were not barred by merger policy, by the Wraparound Agreement or by the Ozark-ALPA CBA.[12] *Supra*, pp. 3, 7, 8.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[12] The continued efficacy of the Ozark-ALPA CBA following finalization of the merger was, at the least, uncertain. *See Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 40 (1987) (successor "not bound by the substantive provisions of the predecessor's" CBA); *Chicago, M., S.P. & P.R.R.* v. *RLEA*, 658 F.2d 1149, 1174 (7th Cir. 1981) (same under RLA), *cert. denied*, 455 U.S. 1000 (1982). And, a transition agreement entered into by, *inter alia*, representatives of the Ozark pilots expressly confirmed that the Ozark CBA was extinguished. App., 18, 53.